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Supreme Court, U. S.
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In the Supreme Court of the United States

72-223

BERNIE and RUTH HAHN,

Petitioners,

vs.

NORWEGIAN AMERICA LINE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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vs.

NORWEGIAN AMERICA LINE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Bernie and Ruth Hahn, plaintiffs-appellants in the Court below, pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit in this case, entered on April 19, 1972.

Opinion Below

The opinion of the Court of Appeals for the Seventh Circuit is appended hereto as Appendix A. The opinion of the District Court for the Northern District of Illinois, Honorable Hubert L. Will presiding, which was adopted *in toto* by the Court of Appeals, is appended hereto as Appendix B. Neither opinion is officially reported.

Jurisdiction

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit was entered in this case on April 19, 1972. The time within which petitioners could file this petition was extended until August 8, 1972 by order of Justice Rehnquist on July 19, 1972. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

The Court of Appeals for the Seventh Circuit affirmed the order and opinion of the District Court of the Northern District of Illinois granting summary judgment for defendant. The important questions presented for review by this Court are the following:

1. Whether the Seventh Circuit misapplied maritime law as established by this Court in permitting respondent to escape liability for grossly misrepresenting the conditions on its cruise by relying on a provision in fine print on the back of its cruise ticket unilaterally shortening the statutory limitations period from five years to four months, when that provision was never read, agreed to or known to exist by petitioners?

2. Whether, under federal maritime law, a large organization in a superior bargaining position can avoid liability by relying on exculpatory provisions appearing in fine print on the back of lengthy form contracts?

3. Whether a provision in fine print on the back of a cruise ticket shortening the statutory limitations period from five years to four months amounts to a practical abrogation of the right to bring suit and is unenforceable as contrary to public policy and due process of law?

Constitutional and Statutory Provisions Involved

Article III, Section 2 of the United States Constitution provides in pertinent part:

> "The judicial power shall extend . . . to all cases, of admiralty and maritime jurisdiction."

Ill. Rev. Stat., Ch. 83, Sec. 16 (1969) provides in pertinent part:

> "Actions on unwritten contracts, expressed or implied . . . shall be commenced within 5 years next after the cause of action accrued."

STATEMENT OF FACTS

On March 6, 1970, petitioners filed their Complaint (R. 2) in this case, alleging that respondent breached its contract to carry petitioners on a 63-day pleasure cruise around South America by fraudulently misrepresenting the accommodations, service, food and drink, entertainment and general atmosphere which would be available on its cruise ship. On April 7, 1970, respondent filed its answer alleging that petitioners' claim was barred because suit was not brought within four months of the time petitioners left the cruise as required by a provision appearing in fine print on the back of respondent's ticket and moved for summary judgment based thereon. The undisputed facts are as follows:

In December 1968, Bernie Hahn contacted the Sentinel Travel Bureau, Inc. (Sentinel) regarding the desire of he and his wife to take a pleasure cruise. (R. 2, p. 2). A series of discussions relating to the All American Carnival Cruise leaving New York, N. Y. on January 6, 1969 ensued

between the Hahns and employees of Sentinel and respondent (R. 2, pp. 2-4), as a result of which the Hahns were induced to purchase passage on the cruise. (R. 2, p. 4).

Thereafter, either Mr. or Mrs. Hahn picked up various documents at Sentinel, among which was petitioners' ticket. (R. 24, pp. 1-2; R. 25, pp. 1-2; see Appendix C hereto, pp. 19-21). For purposes of this petition, the relevant features of this ticket are the "box" which appears on the passengers' copy, the notice which appears in fine print below the box, and provision 11 which appears on the back of the passenger's copy in fine print.

Nowhere on the ticket is there a place for the signature of the passenger or the shipper's agent. In fact, petitioners never signed their ticket or any other document purporting to be their contract for passage on the cruise. (R. 24, p. 2; R. 25, p. 2).

Further, at no time during the course of the pre-cruise conversations did anyone, including any agent, employee or representative of respondent or Sentinel inform the Hahns either orally or in writing that the conditions on the back of the Hahns' ticket were intended by respondent to comprise part of the passage contract. Nor did anyone advise the Hahns that the limitations period for claims relating to passage on the cruise was four months, or that such condition was imprinted anywhere on the ticket. (R. 24, p. 3; R. 25, p. 3).

What became of the Hahns' ticket is unknown. It is known that the Hahns did not have any portion of their ticket in their possession when they left the cruise on January 14, 1969 or any time thereafter. (R. 24, p. 2; R. 25, p. 2).

Only four days after petitioners left the cruise, petitioners' attorney, Jerold S. Solovy, wrote respondent advising that the Hahns had left the cruise due to unbearable conditions on the cruise, and demanded a refund. (R. 15, p. 2, Ex. G).

Thereafter, petitioners' counsel and respondent exchanged eight additional letters regarding petitioners' demands in an effort to settle this matter. (See R. 15, Ex. G through T). At no time during the course of this correspondence did the respondent's agents or employees advise petitioners that their ticket contained a four month claim limitation, until respondent's last letter on February 26, 1970, at which time the four month limitation period had long since elapsed.

At no time prior to February 26, 1970 did petitioners have any knowledge that a four month limitation period was printed on the back of their ticket, as they never read the ticket and neither the respondent nor its agent ever directed their attention to the provisions appearing on the back of their ticket.

Shortly after their return to Illinois, Bernie Hahn suffered a nervous breakdown and was hospitalized until June, 1969. While hospitalized, several businesses which he and his wife owned collapsed, resulting in the filing of bankruptcy papers on September 5, 1969. Prior to that time and during the remainder of 1969 and early 1970, Bernie Hahn was thoroughly engaged in trying to save his businesses and, when that failed, winding them up. (R. 24, p. 3; R. 25, p. 3). After these pressing matters were completed, the instant suit was filed.

On April 5, 1971, the Honorable Hubert L. Will rendered a memorandum opinion and entered an order granting summary judgment in favor of respondent based on the above facts. A copy of the District Court's opinion is appended hereto. (App. B, pp. 2-15).

On April 12, 1971, petitioners filed a Notice of Appeal to the Court of Appeals for the Seventh Circuit, which rendered its decision (App. A, p. 1) on April 19, 1972, saying:

> "Having heard the arguments and studied the briefs of the parties and the authorities cited therein, we are agreed that the opinion of the district court is clearly correct, and we adopt that opinion in its entirety as if our own.
>
> "The judgment of the district court is affirmed."

Petitioners pray that a writ of certiorari issue to review the decision of the Court of Appeals entered in this case for the reasons given below.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE DECISION BELOW AND DECISIONS OF THIS COURT AND THE SECOND CIRCUIT INVOLVING IMPORTANT QUESTIONS OF MARITIME LAW.

This case involves a breach of a maritime contract and therefore falls within federal admiralty jurisdiction. *Archawski* v. *Hanioti*, 350 U.S. 532, 533 (1956). By force of the United States Constitution, maritime law is developed and declared in the last analysis by this Court or by Act of Congress. *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970); *Moore-McCormack Lines, Inc.* v. *Amirault*, 202 F.2d 893, 896-897 (1st Cir. 1953). Accordingly, this Court is the appropriate body finally to resolve the issues of maritime law posed by this case.

In particular, this Court has repeatedly devoted its time and energies to questions of maritime law when it has been necessary to resolve conflicts between the Circuits. *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.*, 376 U.S. 315, 318 (1964); *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, 542 (1960); *Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297, 300 (1959); *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 358 (1959); *Hellenic Lines Limited* v. *Rhoditis*, 398 U.S. 306, 307 (1970); *Guzman* v. *Pichirilo*, 369 U.S. 698, 699 (1962).

The case at bar likewise presents an important question of maritime law regarding which there has developed a conflict between the Circuits and with prior decisions of this Court.

A.

Under Maritime Law As Declared By This Court And Followed By The Second Circuit, In Receiving Their Ticket Petitioners Accepted Only The Terms Contained In The Section Of Their Ticket Setting Forth The Essential Terms Previously Agreed To Orally.

Most cruise passage tickets have imprinted on them "conditions" established by the carrier. However, under maritime law these conditions do not automatically become terms of the contract between the passenger and the carrier. Whether such conditions become part of the contract depends on the form of the ticket. *The Kungsholm,* 86 F.2d 703, 704 (2d Cir. 1936).

Normally, a cruise ticket will set forth on its face the terms which the parties necessarily agreed upon orally: the names of the passengers, the dates and places of embarkation and arrival, the ship, and the cost of the ticket. These are the essential elements of the contract and the section of the ticket setting forth these terms is referred to as the "body of the contract". Courts rightly assume that the passenger does accept these terms.

However, this Court and the Second Circuit have held that in accepting his ticket the passenger has not accepted the other terms appearing on his ticket. Where, as in the case at bar, the passenger did not actually read his ticket or know of its contents, the courts will assume that the passenger agreed to the other conditions printed on the ticket only if such conditions are specifically referred to within the section containing the essential terms, *i.e.,* "the body of the contract."

The landmark case so holding is this Court's decision in *The Majestic,* 166 U.S. 375 (1897). In that case, several passengers on a steamship cruise sued a steamship company for damages to their baggage. Defendant steamship company relied on several "conditions" set forth on the ticket which, if effective, would have exempted the steamship company from liability. The face of the ticket was titled at the top "Cabin Passenger's Contract Ticket." Immediately below this legend appeared the following: "These Directions and the Notices to Passengers below, form part of, and must appear on, each contract ticket." The body of the ticket face contained the essential terms relating to passengers, the ship, dates and places of embarkation and arrival and consideration paid. Below the body was another "Notice to Cabin Passengers" which directed the reader to see the back of the ticket. On the back of the ticket various conditions were listed, including those upon which the steamship company relied.

This Court held in *The Majestic* that the reference on the face of the passengers' ticket to the conditions on the back page were not in "the body of the contract", and that the conditions did not, consequently, form part of the contract.

> "The rule is not otherwise in this country, and is stated In *Wheeler on the Modern Law of Carriers,* 263, Thus: 'A notice or memorandum, even though printed upon the bill of lading or other contract of the carrier, *unless referred to in the body of the contract* and thus made a part of it, is no more than a notice, and does not form a part of the contract between the shipper and the carrier'." 166 U.S. at 385. (Emphasis added.)

The standard rule of *The Majestic* case has been consistently applied by the Second Circuit. In *Maribrunn* v. *Hamburg-American SS. Co.,* 77 F.2d 304 (2d Cir. 1935), that Court held unenforceable a provision requiring notice of claims within sixty days, which was specifically referred to on the face of the ticket but to the right of the essential terms, stating:

> "It seems to us that the *Majestic* . . . decide[s] that though a passenger is bound by all that is in the contract itself, in order to charge him with other stipulations they must be incorporated into the body of it, at least by reference." 77 F.2d at 305.

Similarly, in *The Kungsholm,* 86 F.2d 703 (2d Cir. 1936), the Second Circuit held unenforceable a provision requiring notice of claims in 30 days referred to on the face of the ticket, but to the right of a "box" containing the essential terms, stating:

> "[S]tipulations affecting the carrier's liability must either be brought to the knowledge of the passenger or must be incorporated, at least by reference, into the body of the contract, . . . [*N*]*ot all that is printed on the face of the ticket is necessarily within the body of the transportation contract.*" 86 F.2d at 704. (Emphasis added.)

The Second Circuit has fully demonstrated the applicability of this objective standard to tickets, such as petitioners', which have on their face a "box" containing all of "the essential" terms. In *The Kungsholm, supra,* the Second Circuit held that only the terms set forth in the "box" on the ticket face constituted terms of the contract.

In *Mayer* v. *Zim Israel Navigation Company,* 177 F. Supp. 69 (S.D.N.Y. 1959), *aff'd,* 289 F.2d 562 (2d Cir. 1961), *cert. denied,* 368 U.S. 889, the court denied enforce-

ment of a time limitation clause referred to below the "box" on the face of the passengers' ticket. The District Court stated:

> "On top of this 'box' are the words 'ticket and contract'. Underneath this 'box' are the words 'ticket contract' and there follows, in small English print, the various provisions of which the time limit clause is one . . .
>
> "In *The Kungsholm, supra,* the court found that only what was contained in the 'box' was the actual contract. This was so despite the fact that the terms or provisions of the contract were right alongside of the 'box'." 177 F.Supp. at 70.

The "box" rule established in the *Kungsholm* and *Mayer* has been consistently followed by District Courts in the First and Second Circuits. See *Toohill* v. *Cunard Steamship Co.,* 130 F.Supp. 128, 129 (D. Mass. 1955) and *Stapp* v. *Italian-American Lines,* 181 F.Supp. 579 (S.D.N.Y. 1960).

The above cases clearly demonstrate that, following the holding in *The Majestic,* 166 U.S. 375 (1897), the Second Circuit has developed specific objective standards to be applied to steamship tickets in cases similar to that at bar. Application of these decisions to the case at bar leads inescapably to the conclusion that the provisions on the back of the petitioners' steamship ticket did not become part of their passage contract. Thus, the decision of the Seventh Circuit is in direct conflict with this Court's opinion in *The Majestic* and with the opinions of the Second Circuit.

B.

The Seventh Circuit Disregarded The Objective Standards Established By This Court and The Second Circuit and Adopted a New Subjective Test of Its Own.

The provision relied on by respondent was neither contained in nor referred to in the box of petitioners' ticket. In the face of the cases discussed above, the Seventh Circuit nonetheless concluded that the four month provision on petitioners' ticket became part of their passage contract, adopting the District Court's opinion as its own. That opinion makes no effort to distinguish the Supreme Court and Second Circuit cases discussed above, most of which are on all fours with the case at bar, but found instead that the provision relied upon by the respondent became part of petitioners' passage contract because:

> "Here, it is difficult to visualize what further means the defendant might have employed to place Mr. and Mrs. Hahn on notice of the existence of the additional contract terms and conditions." (R. 39, p. 9; App. A, p. 11)

The test adopted by the Seventh Circuit is totally inconsistent with that of the Second Circuit because it requires a completely subjective analysis in each case. It provides no guidelines as to what kind of a warning is sufficient or how tickets should properly be designed.

In contrast, the opinion of this Court in *The Majestic, supra,* and the Second Circuit opinions discussed above provide precise objective standards by which the sufficiency of the passenger warnings on steamship tickets can be evaluated. Steamship lines are placed on notice as to how they must design their tickets. The requirements established in these cases are sufficiently adequate to insure that passengers have notice of the provisions by which they may be bound.

The Seventh Circuit's subjective approach is completely novel. The only authority relied upon by the Seventh Circuit in support of its subjective test is that portion of the decision in *Silvestri* v. *Italia Societa Per Azioni Di Navigazione,* 388 F.2d 11, 17 (2d Cir. 1968) which reads:

> "The thread that runs implicitly through the cases sustaining incorporation is that the steamship line has done all it reasonably could to warn the passenger that the terms and conditions were important matters of contract affecting his legal rights."

The Seventh Circuit completely misconstrued *Silvestri. Silvestri* did not create a new subjective test, or mark the discontinued application of the objective standards established in *The Majestic, The Kungsholm, Maribrunn,* and *Mayer.* The above statement was pure dicta, not the basis of the court's decision, which held that the steamship line *could not* rely on the exculpatory language on its ticket.

The error of applying the Seventh Circuit's subjective test is demonstrated by the facts of this case. As shown above, the Hahn's ticket did not satisfy the precise objective standards established by this Court and the Second Circuit for incorporation of the four month limitations provision. Yet, the Seventh Circuit held that the requirements of incorporation were met *because the steamship line had done all it reasonably could to warn* its passengers of the provisions on the back of their ticket. Much more could have been done.

In addition to satisfying the specific requirements established in *The Majestic* line of cases, there were a number of other things the Norwegian America Line might reasonably have done to place petitioners on notice of the additional contract terms. Respondent could have provided

a place on its tickets for the passenger's signature indicating his assent to the contract provisions, as exemplified by the receipt which is appended hereto. (App. D, pp. 20-21.) (R. 36). The necessity of a signature clearly warns a person that he is entering into a contract. Respondent could have also required its agent to direct the petitioners' attention specifically to the contract provisions at the time they picked up the ticket. It could have informed petitioners' attorney of the provisions after the claim had been filed, but before the four months had elapsed. At the very least, the defendant could have printed the notice in larger print. Interestingly, the *Silvestri* case, *supra*, relied upon by the Seventh Circuit for its subjective test, was decided on the basis that the notice on the passengers' ticket in that case was too small, although it was printed in the same type size as was the notice on petitioners' ticket.

In sum, the Seventh Circuit's decision in this case demonstrates that unless specific objective standards are applied to determine whether provisions printed on the back of steamship tickets are incorporated into the passage contract, the result will be numerous inconsistent and illogical decisions.

This Court has not had occasion to reconsider the principle it established in 1897 in *The Majestic* or its application by the Second Circuit. Petitioners submit that, in light of the conflict which has developed between the Second and Seventh Circuits regarding whether an objective or subjective test should be applied, this Court should reconsider its decision in *The Majestic* and reaffirm the objective standards established therein. Those standards provide a protection which is vital to a vast multitude of passengers in this age of mass transportation.

II.

THIS COURT SHOULD CONSIDER WHETHER, UNDER FEDERAL MARITIME LAW, A LARGE CORPORATION IN A SUPERIOR BARGAINING POSITION MAY ESCAPE LIABILITY TO CONSUMERS BY INVOKING FINE PRINT CLAUSES IN LENGTHY FORM CONTRACTS.

This case is of great general commercial importance. Exculpatory provisions of all kinds normally hidden in fine print on the back of lengthy, confusing documents are being foisted upon the unsuspecting public by large organizations in superior bargaining positions. This case squarely presents the question whether this pernicious practice shall be allowed to continue.

It is a universally recognized principle of contract law that a party cannot be bound to contract provisions unless there has been mutual assent regarding those provisions. This principle is set forth by the leading text writers. *See,* 1 Corbin, Contracts §107; 1 Williston, Contracts §2.

The principle which should be applied to this case is set forth in *Corbin on Contracts*:

> "In modern business life there are innumerable 'standardized' contract forms, such as are found in insurance, transportation, sales of goods, and distribution agencies, prepared by one party for his recurrent use in many transactions. They may contain many provisions, often in fine print, the purpose of which is to limit his own obligations and to avoid risks that he would otherwise have to bear. He may present this to the other party, often much less well informed or advised, on the basis of 'accept this or get nothing,' well knowing that the other party does not know or understand. In these cases, the requirement of an actual 'meeting of the minds' may well be made effective against the party in the superior position." 1 *Corbin, Contracts* §107 at 479.

Petitioners vigorously contended before both the District Court and the Court of Appeals that application of this principle to the case at bar required a finding that the provisions on the back of petitioners' ticket did not become part of their contract because petitioners were never advised of nor agreed to the terms on the back of respondent's form ticket. By nevertheless enforcing the four month provision printed in fine print on the back of respondent's ticket, the Seventh Circuit gave license to large corporations in superior bargaining positions to foist upon consumers onerous terms of the worst variety. The enlightened principle urged by petitioners should be adopted to protect the consumer. Respondent should not be allowed unilaterally to write its own "contract" by the use of finely printed forms containing numerous exculpatory clauses. *See* D. Mellinkoff, *How to Make Contracts Illegible*, 5 Stan. L. Rev. 418, 430-31 (1953). This Court should stamp out this pernicious practice once and for all at least as respects contracts governed by federal maritime law.

III.

THIS COURT SHOULD CONSIDER WHETHER A FOUR MONTH LIMITATION PROVISION VIOLATES DUE PROCESS AND IS AGAINST PUBLIC POLICY.

It is well established that contractual provisions limiting the time period for filing suit are against public policy and unenforceable if they are unreasonably short. *See e.g., Brown & Guenther* v. *North Queensview Homes, Inc.*, 239 N.Y.S.2d 482 (App. Div. 1963); *The President Polk*, 43 F.2d 695 (2d Cir. 1930); *Kemelhor* v. *Furness, Withy & Co.*, 248 N.Y.S. 659 (N.Y. 1931) and *Capeheart* v. *Heady*, 23 Cal. Rptr. 851 (Cal. App. 1962).

The facts of the case at bar strikingly demonstrate the unfairness of permitting a steamship company to limit the period in which suits may be brought against it to four months. It is undisputed that petitioners were never advised by respondent and did not know that their ticket contained a four month limitation provision. They were never advised of this provision during settlement negotiations. Shortly after petitioners' return to Illinois, Bernie Hahn suffered a nervous breakdown and remained hospitalized until June, 1969. Between June, 1969 and March, 1970, petitioners were thoroughly engaged in attempting to salvage and then in winding up the affairs of their bankrupt businesses. Immediately thereafter, this suit was filed.

Under these circumstances, this Court should not sanction provisions requiring that suit be filed in four months. A period this short, when established only by fine print on the back of a cruise ticket which the passenger never read, has the practical effect of denying the right to bring suit at all and is a denial of due process of law. *Cf.*, *Fuentes* v. *Shevin*, No. 70-5039, 40 U.S.L.W. 4692 (U.S. 6/12/72). Furthermore, respondent should not be permitted to overrule the public policy of Illinois as determined by its legislature which has provided for a reasonable period of five years in which to bring suit.

This Court should decide whether a provision of this type overruling the stated public policy is valid under any circumstances and whether it violates the right to due process of law.

CONCLUSION

Petitioners earnestly pray that this Court issue its writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the substantial questions raised herein.

Respectfully submitted,

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August 8, 1972

APPENDIX

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 19, 1972

Before

Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. FREDERICK G. HAMLEY, *Circuit Judge**

No. 71-1398
BERNIE HAHN and RUTH HAHN,
Plaintiffs-Appellants,

vs.

NORWEGIAN AMERICA LINE,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 70 C 549
Hubert L. Will, Judge.

Argued—April 10, 1972

ORDER

This is an appeal from the granting by the district court of defendant's motion for summary judgment and the concomitant dismissal of the action.

Having heard the arguments and studied the briefs of the parties and the authorities cited therein, we are agreed that the opinion of the district court is clearly correct, and we adopt that opinion in its entirety as if our own.

The judgment of the district court is affirmed.

* Circuit Judge Frederick G. Hamley of the United States Court of Appeals for the Ninth Circuit is sitting by designation.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 70 C 549

BERNIE HAHN and RUTH HAHN,

Plaintiffs,

vs.

NORWEGIAN AMERICA LINE,

Defendant.

MEMORANDUM OPINION
(Filed April 5, 1971)

Defendant's motion for summary judgment is before the court for disposition. Plaintiffs are citizens and residents of Illinois and have instituted this litigation to recover for an alleged breach of contract. Defendant, Norwegian America Line, is a foreign corporation with its principal place of business in New York. It does business in Illinois, maintaining an office at 333 North Michigan Avenue, Chicago, Illinois. Jurisdiction is predicated on diversity, 28 U.S.C. §1332. The issue is whether plaintiffs' suit is barred by certain limitations set forth and imprinted on their ticket. For the following reasons, we conclude that plaintiffs are bound by the limitations which were imprinted on their tickets and that the instant suit is barred thereby.

FACTS

In December of 1968, it is alleged, Bernie Hahn contacted the Sentinel Travel Bureau, Inc. (Sentinel) and inquired into the possibility of his taking an extended "pleasure cruise" with his wife. Plaintiffs wanted a South America cruise on which they would be provided with certain luxuries and comforts. After preliminary discussions and alleged representations by defendant's Chicago agent, plaintiffs booked passage on the "All Americas Carnival Cruise" aboard defendant's vessel, the *M/S Bergensfjord*. Subsequent to their booking passage on the *Bergensfjord*, either Mr. or Mrs. Hahn picked up from Sentinel the ticket for their cruise.[1]

---

[1] The Cruise Passage Contract below is an exact copy of that which was delivered to plaintiffs prior to their departure.

[At this point in his opinion, Judge Will inserted a copy of petitioners' complete ticket. See Appendix C hereto (pp. 17-19) for pertinent portions thereof.]

After several days on the *Bergensfjord,* the plaintiffs complained of certain conditions and finally advised the ship's officers of their intention to disembark in Vera Cruz, Mexico, on January 14, 1969. Upon leaving the ship, they claimed that they were intentionally misled, badly treated and generally dissatisfied with the conditions of the cruise. On January 18, 1969, plaintiffs, through their attorney, filed a written claim with the company's representative in the United States. Plaintiffs' complaint alleges that at no time during the course of the pre-cruise conversations did anyone, including any agent, employee or representative of the ship company or Sentinel, inform them either orally or in writing that the additional conditions set forth on their ticket were intended to be part of the terms of their contract for passage on the ship. Moreover, it is uncontested that the Hahns were not advised of the four months limitations period for filing suit on claims relating to passage on the cruise other than through the provisions of paragraph 11 printed on the reverse of the ticket, the same paragraph which provides that notice of claim be filed within fifteen days after the passenger leaves the vessel, which provision the plaintiffs complied with by filing their notice of claim on January 18, 1969.

Mr. Finn Odd, defendant's Deputy Director for North America, responded to plaintiffs' counsel's letter of January 18, 1969, and offered to settle their claim for $800.00. Further letters passed between the parties without a resolution. On March 11, 1969, Mr. Odd informed plaintiffs' counsel that the head office would not increase the settlement offer. Suit, however, was not instituted until March 6, 1970, almost fourteen months after the Hahns left the vessel and almost one year after Odd's letter of March 11, 1969.

CONTENTIONS OF THE PARTIES

In its motion, defendant contends that plaintiffs are prevented by the provisions of the cruise passage contract from instituting the instant action. Paragraph 11 thereof requires that notice of any claim other than for bodily injury or death be given the company within fifteen days after it occurs and that suit on any claim be instituted within four months after such date. In opposition, plaintiffs argue that (1) the four months limitations period was not a part of their contract and that they are not bound by its terms;[2] (2) in receiving their ticket, only the essential terms of the oral agreement which were reduced to writing were accepted; (3) the conditions imprinted on the ticket do not automatically become terms of the contract between the passenger and the carrier and that whether such conditions become part of the contract depends on the form of the ticket; (4) the conditions relied upon by defendant appear in print which is unreasonably small and insufficient adequately to incorporate the conditions into the contract; (5) the conditions themselves provide that the state statute of limitations on filing suit is to apply; and (6) the four months limitation for filing suit other than for claims arising out of bodily injury or death is unreasonably short and unenforceable as against public policy.

OPINION

It is uncontested that Mr. and Mrs. Hahn possessed the cruise passage ticket at the time they boarded the *M/S Bergensfjord*. Regardless of such possession, plaintiffs vigorously contend that they are not bound by these terms

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[2] In support, they contend that a mere receipt of a steamship ticket cannot be enough to preclude their suit. Accordingly, they submit that the applicable limitations period is five years. Ill.Rev.Stat. Ch. 83, Sec. 16 (1969).

because they (a) never agreed to them, (b) never read them, and (c) never were specifically informed of their existence either during preliminary negotiations or subsequent to the early termination of the cruise.

Even assuming the validity of plaintiffs' representations, i.e., that they never read or had any knowledge of these conditions, plaintiffs are not entitled to be excused from the effect thereof if the printed notice is found to be part of the passage contract. See, *Murray* v. *Cunard S.S. Co.*, 235 N.Y. 162, 139 N.E. 226 (1923). Decisions on this point, while often conflicting in result, establish a prevailing principle which is articulated in two cases, *The Kungsholm,* 86 F.2d 703 (2d Cir. 1936) and *Baron* v. *Compagnie General Transatlantique,* 108 F.2d 21 (2d Cir. 1939). In *The Kungsholm,* a passenger sued the ship company for personal injuries suffered on a West Indies cruise. The defendant urged that plaintiff's claim was barred because of a condition printed on the back of the ticket. This condition was referred to on the face of the ticket by a reference placed to one side of the "box"[3] which contained the precise terms of the passage. The Second Circuit held that the "condition" was not a part of the passage contract and in so holding said:

> So the question is, what was the contract of transportation? And this turns on the form of the ticket, as we have held in many recent cases, all of which go back to the doctrine of *The Majestic,* 166 U.S. 375, 17

[3] "Box" refers to that portion of a cruise passage ticket which usually contains such information as (a) the name of the cruise; (b) the place of departure, destination and return; (c) the sailing date and time; (d) the full name of the passenger(s); (e) the passenger's address; and (f) the total cruise fare. The box may, however, contain such other information or references as the steamship company may wish to include.

> S.Ct. 597, 41 L. Ed. 1039 (1897) . . . These cases hold that stipulations affecting the carrier's liability must either be brought to the knowledge of the passenger or must be incorporated by reference into the body of the contract, and that not all that is printed on the face of the ticket is necessarily within the body of the transportation contract . . .

In *Baron, supra,* the plaintiff sought to recover for personal injuries suffered while a passenger on the defendant's steamship. The ticket which covered the plaintiff's passage contained a provision that the carrier should not be liable for any claim for bodily injuries, unless a written claim therefor was lodged with the purser prior to the passenger leaving the steamer. In affirming the lower court's dismissal, the Second Circuit stated:

> The distinction laid down in *The Majestic,* . . . is between provisions in a steamship ticket which amount only to notices and provisions which are formally incorporated into the contract of passage. Provisions that are mere notices are not operative, unless actually brought to the passenger's attention. (Citations omitted) On the other hand, provisions that appear on the ticket as part of the contract of passage embodied in the ticket are binding regardless of whether they were read by the passenger, provided they are not unlawful in content. (Citations omitted) *supra,* at 22.

The gravamen of plaintiffs' argument is that, since a court cannot assume that a passenger by receiving his ticket has accepted all terms appearing thereon, and if the passenger did not actually read the ticket or know of its contents, the courts will asume that the passenger

agreed to other conditions printed on the ticket only if such conditions are specifically incorporated by reference in that portion of the cruise ticket which contains the basic terms, i.e., the body of the contract or "box". Because the contract in the instant case contained neither specific language nor any reference to such conditions within the "box", plaintiffs contend that the red notice on the face of defendant's cruise passage contract is merely notice and, therefore, inoperative to incorporate the following provisions in the ticket contract. Thus, it is plaintiff's position that the only contract terms to which they are bound are those terms contained in the "box".

Although plaintiffs correctly evaluate the holdings of the earlier decisions, they do not properly apply the legal principles enunciated therein to the facts of this case. That plaintiffs err can be demonstrated from an examination of the ticket itself. Such an examination demonstrates that the limitation provision is anything but a "mere notice". An even cursory glance reveals that on the face of the ticket immediately below the "box" is printed in red ink "IMPORTANT NOTICE", followed, also in red ink, by a statement that the terms and conditions which followed were accepted by the passenger and the ticket was issued subject thereto.

Faced with plaintiffs' argument that a "box which contains no reference to the conditions relied upon by defendant is inoperative," this Court has reviewed the applicable case law.[4] Implicit in each of those cases holding for the passenger is the underlying premise that the steamship line had not done all that it could reasonably have been expected to do to warn the passenger that the

[4] We have not been cited to nor has our own research produced any recent Seventh Circuit decision on point.

terms and conditions were important contractual limitations affecting the passenger's legal rights. See, *Silvestri* v. *Italia Societa Per Azioni Di Navigazione,* 388 F.2d 11 (2d Cir. 1968).

Silvestri involved an appeal from a District Court's decision granting summary judgment to the defendant steamship company. The District Court had granted the motion on the ground that the plaintiff had failed to bring the action within the one year period as required by a ticket provision. The Court in *Silvestri* held that a steamship passenger ticket which bore the heading "Passenger Contract" in the upper right-hand corner and in the upper left-hand corner stated that it was subject to conditions printed on the cover of the ticket which formed part of the contract, failed to impress upon the passenger the importance of the terms and conditions and was, therefore, insufficient to effect an incorporation in the contract of passage of the conditions limiting the time within which a personal injury suit must be brought.

While the result reached in *Silvestri* is contrary to that which we reach in the instant case, our decision is logically consistent with Judge Friendly's analysis in that case. On the contract there, the Court could not conclude that the steamship line had done all that it reasonably could have done to warn the passenger of the additional conditions. Here, it is difficult to visualize what further means the defendant might have employed to place Mr. and Mrs. Hahn on notice of the existence of the additional contract terms and conditions. Plaintiffs' argument that such provisions are not part of the body of the contract unless the "box" itself contains a specific reference thereto mistakenly omits any consideration of the visual effect which the "IMPORTANT NOTICE" provision here has. Despite

the absence of any reference within the "box", the printed notice has been placed on the defendant's ticket in such manner as to be inescapably obvious. It is, therefore, unavoidably a part of the Hahns' contract of passage.

In the *Silvestri* opinion, the Court stated that "While we would not insist on any particular rubric, seventy years of experience under *The Majestic* doctrine should have enabled the draftsmen of the ticket to produce a warning significantly more eye-catching than this." 388 F.2d at 17. The warning on defendant's ticket is not ineffectively positioned, diminutively sized or so artfully camouflaged that its presence is concealed. On the contrary, as we have previously observed, it is difficult to visualize how the defendant could have produced a more efficacious, eye-catching warning than that which was on the Hahns' cruise passage contract.[5]

We hold, therefore, that the notice imprinted in red lettering and placed on the face of the ticket immediately below the "box" was sufficiently eye-catching and conspicuous as to incorporate the terms and conditions in the ticket contract and, accordingly, to entitle the steamship line to avail itself thereof.

Plaintiffs also contend that the printed conditions relied upon are too small to be adequately incorporated into the contract. *Silvestri* v. *Italia Societa Per Arioni Di Navigazione, supra.* It is true that the court in *Silvestri* found that the ticket was insufficient to incorporate conditions printed thereon into the passage contract. How-

[5] Since the Hahns' affidavits indicate that they never examined their tickets, they would not have been aware of such terms and conditions irrespective of the locations, size or eye-catching character of the red notice.

ever, the test is not the size of the type alone but also whether the notice is readily legible. *Cf. Lipton* v. *National Hellenic-American Lines,* 294 F.Supp. 308 (S.D.N.Y. 1968). In the present case, the notice is so arranged as to constitute a formal part of the contract and the specific provision here involved is readily legible.

Assuming, *arguendo,* that the terms are part of their contract, plaintiffs contend, nevertheless, that those conditions expressly provide that the state statute of limitations is applicable and that, therefore, defendant's motion for summary judgment should be denied. Plaintiffs' argument stems from paragraph 11 of the "Contract of Passage" which provides:

> In any case where the time fixed in this ticket for filing claim is less than allowed by law, such time is hereby extended not to exceed the minimum lawful time.

Plaintiffs aver that, under this provision, the state statute of limitations for filing suits on contracts, rather than the four months period provided in the ticket, becomes applicable. *Santore* v. *American Export Lines,* 235 NYS 2d 887 (Sup.Ct. N.Y. 1962).

Plaintiffs' reliance on Santore is misplaced. Santore involved a suit by a steamship passenger for injuries sustained aboard the defendant's vessel. Defendant moved to dismiss the complaint on the ground that the suit was time barred by virtue of paragraph five of the Transportation Contract which provided:

> Suits and actions to recover for . . . bodily injury to the Passenger shall not be maintainable unless instituted within one (1) year from the day when the . . . injury occurred.

The New York court, after examination of the entire contract, concluded that a time modification provision was a specific part of the Transportation Contract and could not be overlooked or ignored. That provision specified:

> In any case, *where the time fixed is less than allowed by law, such time is hereby extended so as not to exceed the minimum lawful time.* (Emphasis added)

Accordingly, the court held that a three-year state statute of limitations was applicable. In holding as it did, the New York court correctly determined that the contract modification provision referred to and modified the contract time limitation for filing suit.

In the instant case, we are faced with a different situation. Paragraph 11 of the Hahns' ticket contains two distinct time limitations. The first extends to the filing of written claims, which must be effectuated within fifteen days from the date of the passenger s leaving the vessel. The second deals with the institution of suit to recover for such claims. This distinction is particularly relevant to the last sentence of paragraph 11. That sentence, by its terms, refers solely to the time for filing a claim, not, as did the Santore provision, to any and all time limitations specified in the ticket, including the filing of suit. Here it is the failure of the plaintiffs to file suit, not their failure to give notice of a claim, which constitutes the basis of defendant's motion.

In further connection with the interpretation of the provision in question, it should be noted that the applicable federal statutes on notice and institution of such suits contain both a provision on the filing of claims for loss of life or bodily injury, as well as a limitation provision on the

institution of suit on such claims. 46 U.S.C. §183(b). That statute provides specifically:

> (a) It shall be unlawful for the . . . owner of any sea going vessel . . . to provide by . . .contract . . . a shorter period for giving notice of, or filing claims for loss of life or bodily injury, than six months, and for the institution of suits on such claims than one year, such period for institution of suits to be computed from the day when the death or injury occurred.

To the extent that the ticket contract provides a shorter period (45 days) for giving notice of claims for loss of life or bodily injury, the last sentence of paragraph 11 would in effect incorporate the longer (6 months) time period for giving notice of such claims set forth in the statute.

Plaintiffs' final argument is that four months is an unusually short limitations period and that such an unreaonable period constitutes an abrogation of their right to sue at all. Accordingly, they request this Court to find that the limitation provision in paragraph 11 is against public policy and unenforceable. Neither party disputes the fact that contractual limitations periods which are unreasonably short are against public policy and unenforceable. *Brown & Guenther* v. *North Queensview Homes Inc.*, 239 NYS 2d 482 (Sup. Ct. N.Y. 1963); *The President Polk*, 43 F.2d 695 (2d Cir. 1930); *Gapeheart* v. *Heady*, 23 Cal. Rptr. 851 (Cal.App. 1962). Defendant also concedes that in determining whether a particular contract limitation period is reasonable in length, the court should consider the special circumstances of each case. After considering the circumstances of this case, we conclude that four months was a reasonable time to require plaintiffs to institute suit based on an alleged breach of contract.

It is undisputed that plaintiffs, through their counsel, Mr. Jerold Solovy, contacted the defendant on January 18, 1969, seeking a refund from the point that they departed defendant's vessel at Vera Cruz. On February 7, 1969, plaintiffs' attorney was informed by the defendant's Deputy Director for North America that defendant was prepared to refund only $800, the amount paid by another passenger who transferred to the Hahns' cabin after their departure. Mr. Solovy replied to defendant's letter of February 7, 1969, and indicated that the $800 offer was totally unaccepable and that, if an amicable settlement could not be reached, his clients would sue.

Defendant again, on February 18, 1969, communicated with Mr. Solovy and advised him that as far as the Deputy Director of the company was concerned, nothing in excess of $800 would be paid. This was not a final position as the Deputy Director at that time indicated that the entire matter was to be put before the head office. On March 11, 1969, however, defendant communicated its final position to Mr. Solovy and stated:

> We, therefore, reiterate our position and can only offer $800 against full release, reserving our rights under the passage contract and/or otherwise.

It is apparent that plaintiffs were on notice by mid-March of 1969 of the defendant's intention to stand on its rights under the passage contract. Within two months of their having left the Bergensfjord, plaintiffs had exhausted all possibilities for a negotiated settlement. Under such circumstances, a four months limitation period was not unreasonable. Plaintiffs had ample time to file their claim, attempt to negotiate a settlement, and after negotiations failed, to file suit. Instead, they waited until March 6, 1970, almost one year later, before filing suit.

We conclude then that the four months limitation on filing suit for alleged breach of contract provided by the ticket is applicable and that the defendant is entitled to summary judgment. An appropriate order will enter.

United States District Judge
Hubert L. Will

Dated: April 5th, 1971

APPENDIX C

A 5-2625 R

PRINTED IN U.S.A.

PASSENGER'S COPY

Norwegian America Line

Den norske Amerikalinje

(Ships under Norwegian Registry)

N·A·L

CRUISE PASSAGE CONTRACT No. CT ~~400067~~ 38547

CRUISE ALL AMERICAS CARNIVAL DATE JANUARY 6, 1969

FROM: NEW YORK TO: NEW YORK

SHIP BERGENSFJORD SAILING 4 PM ROOM ~~SUBF~~ U-C BERTH all

FULL NAME OF PASSENGER (S)	CRUISE FARE
Mr. Bernie Hahn	$ 3,500.00
Mrs. Ruth Hahn	3,500.00

PASSENGER'S ADDRESS 1525 N.State Parkway,Chicago,Ill.

PLACE AND DATE OF ISSUE Chicago, Ill. November 25,1968 sew

TOTAL FARE $ 7,000.00

SENTINEL TRAVEL BUREAU, Inc.
400 East Randolph Street
Chicago, Illinois 6060~~1~~

AGENT

TOTAL $ 7,000.00

PASSENGER'S COPY

Embarkation 2:00 - 3:30 PM
Monday Jan. 6th,1969
PIER 40 - HUDSON RIVER
New York N.Y.

FOR OFFICE USE

DO NOT USE THIS SPACE

THIS COUPON IS THE PASSENGER'S RECEIPT FOR MONIES PAID.

IMPORTANT NOTICE: THE ATTENTION OF PASSENGERS IS ESPECIALLY DIRECTED TO THE TERMS AND CONDITIONS OF THE "CONTRACT OF CARRIAGE" AND IT IS MUTUALLY AGREED THAT THE CONTRACT TICKET IS ISSUED BY THE COMPANY AND ACCEPTED BY THE PASSENGER SUBJECT TO THE TERMS AND CONDITIONS SET FORTH. A COPY OF THE "CONTRACT OF CARRIAGE" APPEARS ON THE REVERSE SIDE OF THIS PAGE AND CONTINUED ON THE INSIDE COVER OF THIS TICKET.

CONTRACT OF CARRIAGE

It is mutually agreed between the Norwegian America Line and each passenger that the passage money is adjusted upon the basis of, and this contract is issued by the Norwegian America Line and accepted by the Passenger subject to all the terms, conditions, limitations, exceptions and provisions printed, stamped or written on this ticket, on this page and overpage, and that the same constitutes the contract of carriage.

The name of the passenger or passengers, the vessel, the sailing date, the accommodations to be provided, the passage money and the ports of embarkation and disembarkation are as specified on this ticket.

In consideration of the passage money, receipt whereof is hereby acknowledged, and of all the terms, conditions, limitations and exceptions mentioned on this ticket, the Norwegian America Line (hereinafter called the "Company") agrees to transport the passenger or passengers above referred to (hereinafter called the "passenger") from the port of embarkation to the port of disembarkation specified herein subject in the Company's discretion as to substitution of vessels and/or accommodations, and change or postponement of sailing date.

1. This ticket is not transferable or assignable by the passenger, and is valid only on the vessel, and for the voyage indicated. Passage money and charges prepaid shall be deemed fully earned at embarkation, and shall not be refunded in whole or in part under any circumstances whatever.

2. If in the judgment of the captain and/or ship's physician, the presence of any passenger on board may endanger the safety of other passengers, such passenger may be refused passage, if the vessel has not sailed, or, if the vessel has sailed, may be disembarked at any port, and the Company shall not be under any obligation further than to refund the passage money for any unused part of the transportation.

3. The Company may substitute another vessel for the one named herein, whether owned by the Company or not, at the port of embarkation or at any other place. The vessel, either before or after proceeding toward the port of destination and though not required by any maritime necessity, may remain in port, proceed by any route and deviate from or change the advertised or intended route at any stage of the voyage and may proceed to and stay at any places whatsoever although in a contrary direction to, or outside of, or beyond the usual route, once or oftener, in any order, backwards or forwards, for loading and discharging cargo, fuel, stores, laborers, stowaways, passengers, or members of the ship's company, for this, or any prior or subsequent voyage, and/or for any purpose whatsoever that in the opinion of the Company or master may deem advisable. Any such procedure shall be considered not to be a deviation but within the voyage herein intended as fully as if specifically described herein. The above mentioned provisions are not to be considered as restricted by any words of this contract whether written, stamped or printed. The vessel may adjust compasses, drydock and go on ways before or after commencement of the voyage and may sail without pilots, tow or be towed, and assist vessels in all situations and deviate for the purpose of saving life or property.

In case of conditions of weather, surf, shallow water, ice, hostilities, war, insurrection, civil commotion, disturbances, strikes, labor trouble, blockade, interdict, quarantine, warlike or naval operations or demonstrations, earthquakes or epidemics, whether at or near one or more of the ports of call or elsewhere in the course of the voyage, or the happening of any other matter or event, whether of like nature to those above mentioned or otherwise, or whether existing or anticipated before the commencement of or during the voyage, which in the judgment of the Company or master is likely to result in loss, damage or delay to the vessel and/or passengers, or which in the judgment of the Company or the master may make it unsafe or imprudent to proceed on or to continue the voyage or to enter port or discharge passengers and/or cargo, the Company or master shall have the liberty, at its or his absolute discretion, to omit calling at any port without any liability to passengers on account thereof, and the vessel may proceed to such port or ports as the Company or master may deem safe or advisable under the circumstances. Passengers booked for ports omitted from the itinerary will be disembarked, together with their baggage and/or other property, at the next port called at by the vessel, subject to the terms, conditions and exceptions stated herein.

4. The Company shall not be liable in any capacity for any loss, damage, delay or injury to any passenger or to his baggage, personal effects or other property, or for the death of any passenger, whether occurring before, during, or after embarkation, transit, transfer, discharge, delivery or debarkation arising from any of the following causes, wheresoever and howsoever occurring: The act of God, perils or accidents of the sea or other waters and of navigation; causes beyond the Company's control, collision, stranding, jettison or wreck; fire from any cause, barratry of the master or crew; enemies, pirates, robbers; theft or pilferage by any person, and whether in the employ of the Company or not; faults or errors in the navigation or management of the vessel; arrest or restraint, capture, seizure, detention, interference passenger leaves the vessel, or, in the event of the passenger's death while on the voyage, unless such claim is so made and lodged within forty-five (45) days after the passenger's death; and the failure to make and lodge claim as above provided shall bar all suits, actions and claims no matter by whom instituted or made. Suits and actions to recover for claims shall not be maintainable unless instituted within four months of the date of their accrual or the termination of the voyage whichever shall first occur, except that suits and actions to recover for the bodily injury or death of passengers shall not be maintainable unless instituted within one year from the day when the death or bodily injury occurred; these limitations shall be applicable although the Company be a non-resident or foreign corporation. The requirements of this clause cannot be waived by an agent or employee of the Company; they may be waived only by express written agreement of a director of the Company having authority in the premises. In any case, where the time fixed in this ticket for filing claim is less than allowed by law, such time is hereby extended so as not to exceed the minimum lawful time.

12. In the event of the death or personal injury of a passenger due to causes for which the Company may be responsible, the Company's maximum liability shall in no case exceed the sum of $5,000, which sum is hereby agreed as to fairly fixing the maximum damages which will in such event be sustained. The passenger may, however, at any time prior to embarkation by application in writing to the office of the Company in New York, N. Y., U.S.A., or to its home office at Oslo, Norway, obtain an increase in the maximum of liability by paying one-fifth of one per cent of the amount by which the increased maximum liability applied for exceeds $5,000, in which event the increased maximum liability will be substituted for that hereinabove mentioned; but, notwithstanding an increase in the amount of maximum liability, the Company shall never be liable for more than the amount of damage actually sustained. The foregoing limitation of the Company's liability is made in consideration of the rate at which this ticket is sold, which is adjusted in part with reference thereto. The foregoing limitation shall apply to every form of liability arising from such death or personal injury, statutory or otherwise, and whether accruing in favor of the passenger, or of his personal representatives, heirs, or next of kin or of others.

13. All claims for bodily injury, for loss or damage to personal effects, and/or for death, whether such claims are asserted by the passenger or by his legal representatives or by others entitled to assert the same, shall be submitted to arbitration. Such arbitration shall be held either in Oslo, Norway, or in New York, N. Y., U.S.A., at the option of the passenger or other claimant. Each party shall nominate an arbitrator and the two arbitrators so chosen shall designate a third. Each party shall be responsible for the compensation of the arbitrator nominated by him and for one-half of the compensation of the third arbitrator. The award of the said three arbitrators or of any two of them shall be final and the judgment of a competent court may be entered on such award. The arbitrators shall not have the power to award more than the amount of the Company's liability as agreed to in this ticket. In such arbitration, the Company shall also be entitled to the benefit of all limitations, exceptions and conditions as to its liability contained in this ticket. All liability of the Company with respect to any claims mentioned in this paragraph shall terminate and be extinguished unless (1) claim has been made and lodged with the Company in the manner and within the time limited in Clause Eleven of this ticket, and (2) unless written demand for arbitration thereof is made upon the Company in New York, N. Y., U.S.A., or at its home office in Oslo, Norway, within the times limited in Clause Eleven of this ticket for the institution of actions and suits. The above submission of claims to arbitration shall, however, be entirely inapplicable to claims arising on a voyage with respect to which the Company files a petition for limitation of, or exoneration from, liability pursuant to the laws of the United States of America or the laws of any other country.

14. All limitations, exceptions and conditions herein contained as to the liability of the Company shall apply also to the liability, if any, of its agents, vessels (whether owned or chartered), employees and other representatives, and also to the liability, if any, of any vessels employed in the performance of this contract and/or the owners thereof.

15. The illegality or invalidity of any paragraph, clause, or provision of this contract ticket shall not affect nor invalidate any other paragraph, clause or provision thereof.

16. The purchaser hereof covenants and warrants that he is duly authorized by or in behalf of all passengers named on or traveling under this ticket to agree to all terms, conditions, limitations and exceptions herein contained, and by accepting and/or using this ticket he and/or they do agree accordingly and do agree that the same shall be binding on them with the same force and effect as if they had every one of them signed this ticket.

of any sort, or any act of princes, rulers, governments or people, or any power, legal process or stoppage in transit; epidemics, pestilence, quarantine, wars, rebellions, hostilities, riots; strikes, lockouts, stoppage of labor or labor troubles of the Company's employees, or others; shortage or lack of fuel or facilities of any sort; explosions; bursting of boilers; breakage, accidents or derangements of machinery or appurtenances; unseaworthiness whensoever existing, provided the Company has exercised due diligence to make the vessel seaworthy before sailing; salt or fresh water, heat, frost, ice, floods, freshets, smell, taint or leakage from other cargo or baggage or damage from stowage or contact therewith; temperature, refrigeration, fumigation, disinfection, moisture, sweat, rain or spray, stains, breakage, chafage, vermin, insufficiency or absence of marks, numbers, address or description; transshipment to or from and risk of craft and storage thereon; prolongation of the voyage; giving way, falling or destruction of wharf, shed or warehouse. In addition to, but not in substitution for, the provisions of this clause, the Company shall not be liable with respect to any claim whatsoever unless the circumstances giving rise to the claim are due to the negligence of the Company, and the burden of proving negligence shall be on the party asserting the claim. The Company shall also be entitled to avail itself of all exemptions from, or limitation of, liability contained in Title 46, ch. VIII, of the Code of Laws of the United States of America.

5. Passengers receiving medical attendance or supplies from the ship's physician (if carried) do so at their own risk without responsibility of the Company in respect thereof.

6. If any passenger is detained on board or elsewhere at any stage or at destination because of quarantine, port regulations, illness or other cause, and is maintained by or at the expense of the Company, such passenger shall pay for such maintenance at the rate of $2 per day if detained on board and at cost to the Company if detained elsewhere. Passengers carried beyond destination for any reason without fault of the Company shall pay for any additional maintenance and extra transportation.

7. Each adult passenger is allowed, without extra charge, 25 cubic feet for baggage. Passengers must plainly label their baggage with names and the port of destination; otherwise the Company shall not be responsible for any miscarriage or misdelivery thereof.

8. Each passenger represents, and it is hereby agreed, that the total value of the property taken with him on the voyage, which have not been delivered to and accepted by the carrier for transportation under a bill of lading, or which have not been deposited with the Master or vessel's officers assigned to that duty for safekeeping and covered by a receipt issued by the Master or such officers, including his baggage, hand-baggage, money, jewelry, precious stones, securities and other valuables, and the articles mentioned in Section 4281 of the Revised Statutes of the United States, and other property carried on his person or retained in his possession, does not exceed $200.00. The Company shall not be liable in any capacity whatsoever for any loss, damage or delay to any of the passenger's above enumerated property taken with him on the voyage, howsoever and wheresoever occurring, (and even though excess weight is paid for), in excess of the above amount, the fare for the voyage being in part based upon the above agreed limit of value. However, each passenger may, prior to embarkment, deliver a declaration in writing, specifying a higher value and a true description of the articles to the Company in New York City, N. Y., U.S.A., or at the Company's home office at Oslo, Norway, and pay an additional amount of 1% on the excess of value thus specified over $200.00, obtaining a written receipt therefor, in which case the Company's liability shall not exceed such specified value. An oral declaration of value shall not increase the Company's liability. If the actual value of such articles exceed $200.00, and is so declared by the passenger and a charge of 1% on such excess value paid to the carrier, any liability of the carrier whatsoever shall not exceed such valuation. Any liability for partial loss or damage shall be computed on such basis or a less actual value if it be less. In no event shall the carrier be liable for more than the damage actually sustained, nor for any consequential or special damage, and shall have the option of replacing any lost articles or effects and/or replacing or repairing any damaged articles or effects.

9. Passengers will not be liable to pay, nor entitled to receive, any general average contribution in respect of property taken with them on the vessel.

10. All responsibility of the Company shall be limited to that period only while the passenger and his baggage or other property are on board the transatlantic ocean vessel or its tenders. All other transportation hereunder is included for the passenger's convenience, and will be at the passenger's risk, subject to the ordinary conditions of carriage of each Railway or Transportation Company employed for the purpose, or to any special conditions required by them.

11. The Company shall not be liable for any claim whatsoever (including claims for bodily injuries or death) of, or with respect to, a passenger or his baggage, or personal property, unless a written claim therefor is lodged with the Company in New York, New York, U.S.A., or at its home office at Oslo, Norway, within fifteen days after the

17. The passenger must take proper steps (including provision of all necessary documents) as may be required to enable him to land at his port of destination and generally to comply with the laws of the country in which such port is situated. The Company shall not in any circumstances whatsoever and whether or not such documents are produced to him by the passenger or information or advice as to said laws is given by him to the passenger be liable for the consequence of any insufficiency or irregularity in such documents or the non-compliance by the passenger with such laws.

18. The passenger must see that baggage is distinctly labeled with his name, ship, date of sailing and destination, and if he shall fail to do so, the Company shall not be held liable for loss of the baggage or delay in delivery thereof.

19. In making any arrangements for the care or transportation of any passenger or his or her baggage by any connecting or other carrier, railway, vessel, craft, transportation company, tramway, carriage, automobile, aircraft or otherwise howsoever than by the Company's ships or tenders used for the purpose of embarking or disembarking passengers to or from such ship, or in making any arrangements for shore accommodations, victualing, amusement or entertainment for any passenger, or for any other service or facility whatsoever for any passenger otherwise than aboard the Company's ships or tenders aforesaid, it is understood and agreed that the Company is merely acting in the capacity of agent for the party or parties actually providing such care, transportation, accommodation, victualing, amusement, entertainment, service or facility aforesaid, and that the same are provided subject to the terms appearing in the tickets, vouchers, or notices for the time being in force of such party or parties or otherwise imposed by such party or parties. It is further understood and agreed that the Company is not to be held liable for the act, neglect, default or omission of any party whomsoever in respect of any events, matters or things whatsoever or wheresoever, elsewhere than aboard the Company's ship or such tenders as aforesaid.

20. The Company reserves the right to cancel any scheduled call at any port for any reason at its option at any time, whether before or after the sailing of the vessel, without previous notice to the passenger, and without liability to the passenger for any loss, damage or delay whatsoever howsoever consequential thereon, but if the port of debarkation named in this contract ticket is a scheduled call so cancelled then

(a) if such scheduled call be cancelled before the sailing of the vessel the Company shall at the option of the passenger either
  (1) refund to the passenger the full amount of the passage money, whereupon this contract shall be terminated without any further liability whatsoever on the part of the Company to passenger or
  (2) furnish to the passenger orders, tickets, or vouchers by sea and/or rail, as the case may be, to the port of debarkation named in this contract ticket from the nearest port at which the vessel calls to such port of debarkation, in which event the transit of the passenger to such port of debarkation from the time of leaving the Company's vessel shall be at the sole risk of the passenger in every respect and the Company shall be under no further liability whatsoever to the passenger.

(b) if such scheduled call be cancelled after the sailing of the vessel the Company shall furnish to the passenger orders, tickets or vouchers for transportation in accordance with and upon the terms set out in sub-clause (a-2) immediately preceding.

21. The right is reserved to consider this passage ticket as cancelled and the passage money forfeited if the passenger does not use this contract ticket for the ship and date mentioned, or other ship substituted, or should this contract ticket become lost or mislaid.

22. All questions arising on this contract ticket shall be decided according to Norwegian Law, with reference to which this contract is made.

Passengers are reminded that the cancellation of accommodation represents a full loss of revenue involved unless notification is given in time to enable the Company to resell the accommodation. The Company has the right under terms of the passage contract ticket to refuse refunds when passengers cancel or transfer to other sailings if space released is not resold.

Passengers are particularly requested to notify the Company's Head Office or if more convenient the nearest Company's Branch Office, at least fourteen days prior to date of sailing, should they desire to transfer to another sailing or to a higher class in the same sailing or to change the port of embarkation already shown on the ticket.

Since changes in sailing are occasionally unavoidable, please confirm at least 10 days before the sailing date through our nearest office or branch office, the exact time of sailing and the embarkation hours also procuring your supply of baggage tags and labels for your trip.

NORWEGIAN AMERICA LINE
(Den Norske Amerikalinje A/S)

APPENDIX D

Lessor: **Hertz Rent A Car Licensee** PAGE 2 SHOW THIS NO. ON ALL CORRESPONDENCE

95034 **Rental Agreement LA** 088895 7

P. O. BOX 532
HARLINGEN, TEXAS 78550
PHONE: GA 3-5312

TO BE PAID BY IMPRINT OR PRINT ONLY: 3448 194 0048 4NA70
JENNER AND BLOCK
JEROLD S SOLOVY
135 SO LASALLE ST
CHICAGO ILL

CREDIT CARD: NO. — HTZ | AMEX | CARTE BLANC | DIN | ATC | OIL | BANK | OTHER

OTHER BILLING INSTRUCTIONS, ETC.

DRIVER'S LICENSE NO. STATE EXPIRES

CAR TO BE CHECKED IN AT (CITY/STATE) LOC. NO. VEHICLE NO. CAR WILL BE RETURNED BY: A.M. P.M.

CAR RENTED AT (CITY/STATE) AREA & LOCATION NO.
HARLINGEN, TEXAS

I HAVE READ THE TERMS & CONDITIONS ON PAGE 1 (OTHER SIDE) AND PAGE 2 OF THIS RENTAL AGREEMENT AND AGREE THERETO:
X

Thank you for your business.

LOCAL CONTACT PHONE NO.

BASIC CHARGE ONE DAY PLUS MILEAGE.

HERTZ INSURANCE NOT VALID IN INTERIOR MEXICO

95034 RENTAL AGREEMENT LA 088895 7

HARLINGEN, TEXAS

CAR CHECKED IN AT (CITY/STATE): Harlingen Texas — LOC. NO.
CREDIT APPROVAL NO. TIME IN 8 30 PM 12-30-70
TIME OUT
CAR LIC. NO. STATE
CAR MAKE BODY STYLE
MILEAGE IN 2892
MILEAGE OUT 2971
MILES DRIVEN 79
MILEAGE DETERMINED BY READING FACTORY-INSTALLED ODOMETER
DEPOSIT $ I.C. ☐ YES ☐ NO
OWNING CITY/STATE
ACCEPTS: X — COLLISION DAMAGE WAIVER (CDW) — DECLINES: X
BY HIS INITIAL, Customer accepts or declines CDW at rate shown in adjoining column. (MAXIMUM FIVE (5) TIMES DAILY FEE FOR EACH FULL WEEK)
R/A PREPARED BY (LAST NAME)
CASH REFUND: GAS-OIL REPAIRS $; DEPOSIT $
POSTED TO DRB
PAID BY (X): CASH | CHECK | DIRECT BILL | CENT. BILL | GUARANTEED | LOCAL REC.
R/A COMPUTED BY (LAST NAME) Hone

DAYS @	3 @	42 00
HRS. @		
WKS. @		
MILES @	11 06	
SUBTOTAL	53 06	
	10 61	
SUBTOTAL	42 45	
SERVICE CHARGE		
TOT. RENTAL OR MINIMUM CHG.		
TAX REIMBURSEMENT		
$ PER DAY	6 00	
TOTAL CHARGES	48 45	
LESS: GAS-REPRS.		
NET DUE		
NET DUE	48 45	

Hertz

DO NOT PAY FROM THIS COPY (FOR YOUR RECORD ONLY)
CHARGES SUBJECT TO FINAL AUDIT.
CUSTOMER'S MEMO COPY

CUSTOMER IS LIABLE FOR ALL PARKING & TRAFFIC VIOLATIONS.

330D (10/69)

Rental Agreement

You don't just rent a car. You rent a company.
Renting you a good, clean Ford is just where we begin..

PAGE 1

Lessor hereby rents Vehicle to Customer subject to all the terms and conditions of this Agreement, in consideration whereof Customer hereby acknowledges and agrees:

1. This Agreement consists of all the terms and conditions on this page (Page 1) and on page 2 hereof (reverse side), whether printed or written. "Customer" means the person(s) signing this Agreement and any other person or organization to whom charges are billed by Lessor at the direction of the person so signing, all of whom shall be jointly and severally liable hereunder. "Vehicle" means the automobile identified in this Agreement and all tires, tools, accessories and equipment attached thereto or contained therein.
2. Vehicle is the sole property of Lessor. This is an agreement of rental only. Customer is not Lessor's agent for any purpose.
3. Customer shall return Vehicle to Lessor in the same condition as received, except for ordinary wear, at the location where rented or other rental office if designated in this Agreement, on the return date specified in this Agreement or sooner if demanded by Lessor. Lessor reserves the right to repossess Vehicle at any time without demand at Customer's expense if Vehicle is used in violation of this Agreement, or is illegally parked, or is used in violation of law, or is apparently abandoned. In the event of loss or damage to Vehicle while on rental, whether or not due to the fault of Customer, Customer shall pay to Lessor on demand the amount of all resulting loss and expense of Lessor, except:
   (a) COMPREHENSIVE, INCLUDING FIRE AND THEFT-Customer is NOT responsible for direct and accidental loss or damage to Vehicle from fire, theft or other causes insurable under the Comprehensive coverage of a standard automobile physical damage policy; and
   (b) COLLISION OR UPSET-If Customer has complied with all terms and conditions of this Agreement, but not otherwise, Customer's responsibility for direct and accidental loss or damage to Vehicle from collision or upset:
      (i) is LIMITED to a maximum of $100; or
      (ii) is WAIVED by Lessor if Customer accepts Collision Damage Waiver at time of rental by initialling in "Accepts" box on Page 2.
4. Customer shall pay Lessor on demand the sum of:
   (a) time and mileage charges computed at the rates shown in this Agreement (mileage to be determined by reading factory-installed odometer);
   (b) basic, minimum, service, Collision Damage Waiver, and other charges when applicable to the rental;
   (c) state and local sales and use taxes on the rental, or the amount charged by Lessor as reimbursement for sales and use taxes on the acquisition or use of Vehicle;
   (d) Lessor's costs, including reasonable attorney's fees, incurred in collecting payments due from Customer under this Agreement;
   (e) fines, penalties, forfeitures, court costs and other expenses, if assessed against Lessor under compulsion of law, with respect to use of Vehicle while on rental to Customer, unless due to Lessor's fault; but this shall not relieve Customer or any other person of direct responsibility to any federal, state or municipal body for his own unlawful conduct.

   All charges are subject to final audit.
5. Customer releases and holds Lessor, its agents and employees, harmless from all claims for loss or damage to personal property of Customer or any other person, left or carried in or upon Vehicle or any service vehicle or premises of Lessor by Customer or such other person, or received, handled or stored by Lessor, at any time before, during or after this rental, whether or not same is due to Lessor's negligence or other fault.
6. Vehicle shall NOT be used:
   (a) to carry persons or property for hire;
   (b) to propel or tow any vehicle, trailer or other object;
   (c) in any race, test or contest.

   If Vehicle is obtained from Lessor by fraud or misrepresentation or is obtained or used in furtherance of an illegal purpose, all use of Vehicle is WITHOUT LESSOR'S PERMISSION.
7. Vehicle shall NOT be operated by any person except Customer and the following Authorized Operators, each of whom must be duly qualified and licensed to drive and must have received Customer's advance permission:
   (a) persons of full age (21 years) who are members of the immediate family of Customer and permanently residing in Customer's household;
   (b) the employer, partner or an executive officer of Customer;
   (c) a regular employee of Customer.
8. Lessor provides coverage for persons using Vehicle with the permission of Lessor (and not otherwise) in accordance with the standard provisions of a Basic Automobile Liability Insurance Policy, against liability for bodily injury, including death (limits $100,000 each person, $300,000 each accident) and property damage (limit $25,000) arising out of use of Vehicle. A copy of said policy is available for inspection at the main office of Lessor on request. Lessor reserves the right, where permitted by law, to provide said coverage under a certificate of self-insurance in lieu of or in combination with an insurance policy. Permission to use Vehicle is expressly limited by Lessor as provided in paragraphs 6 and 7 hereof. Lessor warrants that the coverage described in this paragraph 8 is primary as respects any other insurance available to Customer or other Authorized Operator as above defined.
9. Customer is responsible for and shall pay all parking and traffic violations, unless due to Lessor's fault.
10. No right of Lessor under this Agreement may be waived or modified except by a written instrument signed by the President or a Vice President of Lessor or of Hertz System, Inc.

PLEASE SEE FURTHER TERMS AND CONDITIONS ON REVERSE SIDE (Page 2)

LE COPY

FILED
SEP 7 1972
MICHAEL RODAK, JR., CLERK

No. 72-223

In the
Supreme Court of the United States

BERNIE and RUTH HAHN,
Petitioners,

vs.

NORWEGIAN AMERICA LINE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 72-223

BERNIE and RUTH HAHN,

Petitioners,

vs.

NORWEGIAN AMERICA LINE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER STATEMENT OF FACTS

Supplementing petitioners' Statement of Facts, in 1968 Bernie Hahn was a Chicago supermarket executive (R. 15, Ex. Q), he and his wife were the owners of several businesses (R. 24, p. 3) and were seasoned ocean cruise travellers. (R. 3, p. 3). Having arranged through Sentinel Travel Bureau, Inc., to take a 63-day cruise around South America on the Bergensfjord, a ship owned by respondent, either Mr. or Mrs. Hahn picked up their cruise ticket at Sentinel's office in Chicago. (R. 14, p. 2, R. 24, p. 2). This was shortly after December 10, 1968, well in advance of the date petitioners would be required to leave for New York to board the Bergensfjord on January 6, 1969. (R. 14, Ex. A).

On the cover of the ticket picked up by Mr. or Mrs. Hahn was plainly imprinted in large red type, "CRUISE PASSAGE CONTRACT" (R. 39, p. 2a). Inside, at the top, was plainly imprinted, again in large type, "CRUISE PASSAGE CONTRACT No. CT 38649." In spaces below were typed a description of the cruise, the names and address of the Hahns and the cost of their accommodations, the date of issuance and the name and address of the travel agent and embarkation instructions which read:

> "Embarkation 2:00-3:00 PM
> Monday, Jan. 6th, 1969
> Pier 40 — Hudson River
> New York, N. Y."

Immediately below the embarkation instructions, and running the full width of the page, was printed, in capital letters and red ink:

> "IMPORTANT NOTICE: The attention of passengers is especially directed to the terms and conditions of this contract and it is mutually agreed that this contract ticket is issued by the company and accepted by the passenger subject to the terms and conditions set forth below and continued on the reverse side of this page."

Immediately below this notice was plainly imprinted "CONTRACT OF CARRIAGE." Directly below these words commenced the terms of the contract, starting with the paragraph:

> "It is mutually agreed between the Norwegian America Line and each passenger that the passage money is adjusted upon the basis of, and this contract is issued by the Norwegian America Line and accepted by the Passenger subject to all the terms, conditions, limitations, exceptions and provisions

printed, stamped or written on this ticket, on this page and overpage, and that the same constitutes the contract of carriage."

After another paragraph there was printed in capital letters, on the bottom, right hand side of the page:

"(Contract continued on reverse)"

On the reverse side of the first page were printed 22 numbered paragraphs setting forth the respective rights and obligations of the company and the passengers, including certain conditions and limitations with respect to making claims and instituting suits or actions on claims. Paragraph 11 provided that written claims by passengers must be made within fifteen days after leaving the vessel and that:

"Suits and actions to recover for claims shall not be maintainable unless instituted within four months of the date of their accrual or the termination of the voyage whichever shall first occur, . . ."

At the very end of all of the paragraphs of the contract appeared the printed signature:

"NORWEGIAN AMERICA LINE
(Den Norske Amerikalinje A/S)"

At the bottom of the reverse side of the first page there was imprinted in capital letters:

"Passenger's copy of 'contract of carriage' appears on the last two sheets of this ticket."

The first page described above bore the printed notation at the top on the left side "Pursuer's Copy." The next page was an "Embarkation Coupon." The third page

was the "Passenger's Copy." It contained all of the voyage and other information typed on the "Purser's Copy" and "Embarkation Coupon." Below this information was another notice printed in red capital letters and running the full width of the page:

> "IMPORTANT NOTICE: The attention of passengers is especially directed to the terms and conditions of the 'contract of carriage' and it is mutually agreed that the contract ticket is issued by the company and accepted by the passenger subject to the terms and conditions set forth. A copy of the 'contract of carriage' appears on the reverse side of this page and continued on the inside cover of this ticket."

On the back of this page was plainly imprinted "CONTRACT OF CARRIAGE" and on the rest of the page and on the entire inside of the attached cover appeared another complete copy of the contract in much larger type.

The cruise passage contract delivered to petitioners by Sentinel remained in their possession in its entirety until they boarded the Bergensfjord in New York on January 6, 1969. The "Purser's Copy" and "Embarkation Coupon" were then detached, leaving petitioners in possession of the "Passenger's Copy" fastened to the cover. (R. 15, p. 3).

The last contact between petitioners and anyone connected with respondent was on January 14, 1969, the date petitioners disembarked from the Bergensfjord in Vera Cruz, Mexico. Before leaving they were advised by representatives of respondent that they would not be entitled to any refund under the provisions of the cruise passage contract. (R. 15, Ex. J). Petitioners promptly referred the matter to their attorney, Mr. Jerold S. Solovy of the firm of Jenner & Block, and all correspondence from Mr.

Solovy's initial letter of January 18, 1969, demanding a refund of passage money from Vera Cruz onward, to respondent's unequivocal statement of its position with regard to a refund on March 11, 1969 was between Mr. Solovy and respondent's representatives. (R. 16, Ex. G-R) In his letter of March 11, 1969 Mr. Fin Odd, respondent's Deputy Director for North America, referred to a previous offer to refund $800.00, the amount paid by another passenger who transferred to petitioners' cabin after their departure, and concluded:

> "We, therefore, reiterate our position and can only offer $800 against full release, reserving our rights under the passage contract and/or otherwise." (R. 16, Ex. R).

Despite Mr. Solovy's threats of suit if a refund larger than $800.00 was not offered (R. 16, Ex. O) and his obvious familiarity with the nature of petitioners' complaints (R. 16, Ex. G, O & Q), there was complete silence from March 11, 1969 until February 16, 1970 when Mr. Robert C. Keck, Jr., Mr. Solovy's associate, wrote Mr. Odd threatening suit if an offer of adequate compensation was not received. (R. 15, Ex. S). The complaint was not filed until March 6, 1970, nearly fourteen months after the petitioners left the Bergensfjord and nearly a year after Mr. Odd's clear statement that respondent intended to stand on its rights under the passage contract.

GROUNDS WHY THE CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

I.

THERE IS NO CONFLICT WHATSOEVER BETWEEN THE DECISION BELOW AND DECISIONS OF THIS COURT AND THE SECOND CIRCUIT. PETITIONERS SIMPLY SEEK ANOTHER REVIEW OF THE DISTRICT COURT'S ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT.

A.

The Courts Below Followed Applicable Principles Of Maritime Law As Declared By This Court And The Second Circuit In Holding That Petitioners Were Bound By The Suit Time Provisions Contained In Their Passage Contract.

The principal question before the district court, in considering respondent's motion for summary judgment, was whether the suit time limitation in petitioners' cruise passage contract was binding upon them when they denied having read the document or having any knowledge of its contents. (R. 24, p. 2, R. 25, p. 2). To say the least, petitioners' claims of complete ignorance about a cruise passage ticket representing a $7,000.00 investment are very difficult to believe, particularly when the date, time and place they were to embark appeared directly above the red "IMPORTANT NOTICE" directing their attention to the terms and conditions of the contract. Nevertheless, in considering the question of the binding effect of the suit time provision, the district court assumed the validity of petitioners' claims. (R. 39, p. 5).

After carefully reviewing the applicable case law, the district court ruled, in the opinion adopted by the court of appeals in its entirety as if its own (Petition, App. A, p. 1), that petitioners would not be entitled to be excused from the contract terms and conditions, regardless of not having read or had any knowledge of them, if the printed notice was found to be part of the passage contract. (R. 39, p. 5). The cases, the court said, distinguish between provisions in steamship tickets which amount only to notices and provisions which are formally incorporated into the contract of passage. Provisions that are mere notices are not operative unless actually brought to the passenger's attention but provisions that appear on the ticket as part of the contract of passage embodied in the ticket are binding regardless of whether they were read by the passenger, providing they are not unlawful in content. (R. 39, pp. 6, 7). As to petitioners' ticket, the court said that an examination of the ticket itself demonstrated that the limitation provision was anything but a "mere notice." Describing the "box" as that portion of a cruise passage ticket which usually contains such information as (a) the name of the cruise; (b) the place of departure, destination and return; (c) the sailing date and time; (d) the full name of the passenger(s); (e) the passenger's address; and (f) the total cruise fare, the court said:

> "An even cursory glance reveals that on the face of the ticket immediately below the 'box' is printed in red ink 'IMPORTANT NOTICE,' followed, also in red ink, by a statement that the terms and conditions which followed were accepted by the passenger and the ticket was issued subject thereto." (R. 39, p. 8).

Faced there, as in this Court (Petition, pp. 10, 11), with a contention on behalf of petitioners that the contract conditions were inoperative because no reference to

them was contained in the "box," the district court said it had reviewed the cases cited in support of the contention and that implicit in each case holding for the passenger was the underlying premise that the steamship line had not done all it could reasonably have been expected to do to warn the passenger that the terms and conditions were important contractual limitations affecting the passenger's legal rights. (R. 39, p. 8). Considering this premise with respect to petitioners' ticket, the court said:

> "Here, it is difficult to visualize what further means the defendant might have employed to place Mr. and Mrs. Hahn on notice of the existence of the additional contract terms and conditions. Plaintiffs' argument that such provisions are not part of the body of the contract unless the 'box' itself contains a specific reference thereto mistakenly omits any consideration of the visual effect which the 'IMPORTANT NOTICE' provision here has. Despite the absence of any reference within the 'box,' the printed notice has been placed on the defendant's ticket in such a way as to be inescapably obvious. It is, therefore, unavoidably a part of the Hahns' contract of passage." (R. 39, pp. 9, 10).

Commenting upon *Silvestri* v. *Italia Societa Per Azioni Di Navigazione,* 388 F.2d 11 (2d Cir. 1968), a case strongly urged in support of petitioners' contentions because the Second Circuit there expressed the opinion that the draftsmen of the ticket under consideration should have been able to produce a much more significant warning, the district court said:

> "The warning on defendant's ticket is not ineffectively positioned, diminutively sized or so artfully camouflaged that its presence is concealed. On the

contrary, as we have previously observed, it is difficult to visualize how the defendant could have produced a more efficacious, eye-catching warning than that which was on the Hahns' cruise passage contract.

"We hold, therefore, that the notice imprinted in red lettering and placed on the face of the ticket immediately below the 'box' was sufficiently eye-catching and conspicuous as to incorporate the terms and conditions in the ticket contract and, accordingly, to entitle the steamship line to avail itself thereof." (R. 39, p. 11).

Commenting upon a contention that the printed conditions relied upon were too small to be adequately incorporated into the contract, the district court stated:

"It is true that the court in *Silvestri* found that the ticket was insufficient to incorporate conditions imprinted thereon into the passage contract. However, the test is not the size of type alone but also whether the notice is readily legible. Cf., *Lipton* v. *National Hellenic-American Lines,* 294 F.Supp. 308 (S.D.N.Y. 1968). In the present case, the notice is so arranged as to constitute a formal part of the contract and the specific provision here involved is readily legible." (R. 39, p. 11).

B.

The Contentions Of Petitioners Rejected By The Courts Below And Raised Again In Their Petition Are Based On Easily Distinguishable Cases.

The contention advanced on pages 8 through 11 of the petition to the effect that contract terms and conditions are binding without a passenger's knowledge only if such conditions are specifically referred to within the "box" and that only matter within the "box" constitutes the body of the contract is not a correct statement of the law

and it properly was rejected when advanced in the courts below. The cases cited in support of the contention are easily distinguishable.

The Majestic, 166 U.S. 375 (1897) (Petition, p. 9), concededly is one of the landmark cases on the subject under discussion but it most assuredly is not authority for the contention that only matter in the "box" of a passage ticket constitutes the body of the contract. The ticket involved is reproduced in the opinion and we invite a comparison between it and petitioners' ticket. It will be noted that the statement on the face of the ticket in *The Majestic* referred only to "These Directions and Notices to Passengers *below*" as forming part of the contract ticket. There was no reference whatsoever *on the face* of the ticket to any contract conditions. Conditions, including a baggage value limitation, were printed on the back of the ticket under the words "NOTICE TO PASSENGERS" but the only reference on the face of the ticket to anything on the back was a bracket containing the words "See Back" in the lower right hand corner. (In connection with subsequent discussions of petitioners' contentions about the "box," it is also important to note that all of the notices setting forth conditions and limitations in the ticket in *The Majestic* appeared *below* the signature of the steamship company.)

The passengers in *The Majestic* had not read their tickets and had no knowledge of the conditions printed on the back. The holding of the court was that:

> "On the evidence, we are unable to conclude that the libellants should be held bound, as a matter of fact, by any of the alleged conditions or limitations. They were not included in the contract proper, in terms or by reference."

The landmark case distinguishing between "mere notices" and binding provisions in steamship ticket contracts is *Murray* v. *Cunard Steamship Co., Ltd.*, 235 N.Y. 162, 139 N.E. 226 (1923), in which the New York Court of Appeals held that a passenger was bound by a provision requiring written notice of claim within a specified period despite the passenger's claim that he had not read the ticket and had no knowledge of the limitation provision. Judge Cardozo's opinion stated that "The plaintiff's ticket . . . is described in large type as a 'cabin passage contract ticket.' It provides, again in large type, that 'this contract ticket is issued by the company and accepted on the following terms and conditions.' . . . At the top of the ticket is printed a notice 'The attention of Passengers is specially directed to the terms and conditions of this contract.'" The reason the passenger was held to be bound by the claim limitation provision was that:

> "This is not a case of a mere notice on the back of a ticket, separate either in substance or in form from the body of the contract. The Majestic, 166 U.S. 375, 17 Sup. Ct. 597, 41 L.Ed. 1039. Here the condition is wrought into the issue, the two inseparably integrated. This ticket, to the most casual observer, is as plainly a contract, burdened with all kinds of conditions as if it were a bill of lading or a policy of insurance. 'No one who could read could glance at it without seeing that it undertook * * * to prescribe the particulars which should govern the conduct of the parties until the passenger reached the port of destination.' Fonseca v. Cunard S.S. Co., 153 Mass. 553, 27 N.E. 665, 12 L.R.A. 340, 25 Am. St. Rep. 660. In such circumstances, the act of acceptance gives rise to an implication of assent. 1 Williston on Contracts, §§ 90, 90a, 90b; Fonseca v. Cunard S.S. Co.,

supra; New York Cent. & H. Ry. Co. v. Beaham, supra. *The passenger who omits to read takes the risk of the omission.*" (Emphasis added)

The contention advanced in the petition about the body of the contract being confined to the "box" is based upon five cases. In each case the decision in favor of the passenger was controlled by the location of the notices and the terms and conditions *relative to the location of the signature of the steamship company* plus, in some of the cases, uncomplied with provisions for the signature of the passenger. The ticket involved in each case and petitioners' ticket were entirely different in these controlling aspects.

The opinion in *Maibrunn* v. *Hamburg-American S. S. Co.*, 77 F.2d 304 (2d Cir. 1935) (Petition, p. 10), discloses the facts controlling the court's conclusion that a claim notice provision on the back of a steamship ticket was not binding on a passenger who asserted that he had not examined his ticket and had no knowledge of the provision:

". . . On the face of the ticket, *but at one side of the printing and writing which formed the contract proper,* so far as there was one, was a legend reading as follows: 'Notice. The attention of passengers is especially directed to the terms and provisions of this contract printed on the reverse side, *which must be signed by the passenger* and the agent.' On the back was a clause that written notice of any claim with full particulars must be served on the defendant within sixty days after termination of the voyage. *The plaintiff never personally signed the ticket,* and though it was signed by the 'travel bureau' from which he bought it, this was certainly done, not as his agent but as the defendant's. This abundantly

appears from the fact that the 'bureau' not only signed on the back as the defendant's agent, but was the only person signing the contract for the defendant *on its face*. Thus the question is whether the legend charged the plaintiff with what was on the back, merely because he accepted the ticket, though without knowledge, for he had not examined it." (Emphasis added)

Commenting upon *The Majestic,* supra, the court continued:

"While the form of that notice also was not the same, we understand the case to decide that, though a passenger is bound by all that is in the contract itself, in order to charge him with other stipulations they must be incorporated into the body of it, at least by reference. A mere notice on the front of the ticket, which is not part of the contract, charges him only if he sees it in season."

Acknowledging that nice distinctions were sure to arise, the court went on to say:

"Yet, as we understand it, just this distinction does exist; only the contract proper charges the passenger, and *the contract is taken as those words which the carrier in some way authenticates by its own signature;* notices and legends *alongside* are not part of it." (Emphasis added)

Expressing some doubt as to how satisfactory its result was in theory, the court concluded that it was a practical compromise, saying:

". . . At least there is no hardship in holding that the limitations on the back of the ticket were no part of the contract at bar; the defendant had required them to be signed by the passenger and failed to get the plaintiff to do so."

The *Maibrunn* case was followed in *The Kungsholm,* 86 F.2d 703 (2d Cir. 1936) (Petition, p. 10), another case involving a steamship cruise ticket provision requiring written notice of claim within a specified period after the passenger disembarked. The ticket provided a space for the passenger's signature but the court found that it was not signed before the cruise began and that the validity of the limitation provision had to be decided on the form of the ticket when it was received by the passenger a day before he sailed. In *The Kungsholm,* as in the case at bar, the contention was advanced that the contract was confined to the "box." The opinion reads:

> "It is the contention of the libelant that the contract is contained in the 'box,' covering the left-hand side of the ticket. This sets forth the name of the passenger, the amount of passage money paid, the accommodations he is to occupy, the name of the ship, 'Kungsholm Sailing from New York Feb. 16, 1934 at 5 P.M. from Pier 97, N.R. foot of W. 57th St. Booked as per Itinerary to West Indies Cruise,' and the passenger's home address, Philadelphia. This is followed by the carrier's name, the rubber stamped signature of its Philadelphia agent, and the penciled initial of the person who issued the ticket. In the light of the foregoing authorities we must say that this was the contract of transportation unless the passenger had knowledge of the printed condition which the carrier relies upon. It is true that printed matter *to the right* of this 'box' is headed 'Cruise Contract' and states in large type, 'The following stipulations are a part of this contract which must be signed by the passenger on the overpage immediately upon its receipt.' *But there is nothing above the carrier's signature to incorporate expressly or by reference any of these stipulations;* and, as already stated, there is nothing to show Mr. Moran or his agent had knowledge of

them before he embarked. In the Maibrunn Case also there was a notice on the face of the ticket calling the attention of the passenger to conditions printed on the back." (Emphasis added.)

In *Stapp* v. *Italian-American Lines, Inc.,* 181 F.Supp. 579 (S.D.N.Y. 1960) (Petition, p. 11), the ticket was signed by the carrier's agent below the "box." The information in the "box" was in both English and Italian. *Following the agent's signature* were terms and conditions printed only in Italian. At the end there was an acknowledging paragraph in English and Italian to be signed by the passenger but it was not signed by the plaintiff. On those facts the court held that the entire contract of transportation appeared on the first page of the ticket in the "box" *above the defendant's signature* and denied a motion for summary judgment on the authority of *The Kungsholm.*

The position of the carrier's signature was regarded as decisive in *Toohill* v. *Cunard Steamship Co.,* 130 F. Supp. 128, 129 (D.Mass. 1955) (Petition, p. 11). The opinion reads:

"The ticket described in The Majestic, however, does not bear so close a resemblance to the ticket in the case at bar as that involved in The Kungsholm, 2 Cir., 86 F.2d 703, 705. There, as here, the 'box' on the face of the ticket contained the essential elements of the contract of carriage, and *the signature of the defendant's agent was in the 'box', rather than at the foot of the '"terms and conditions"'.* The Court there held that *since the defendant's signature was in the box,* and since the numbered paragraphs containing the limitation provisions were not incorporated textually or by reference into the box, the limitations were not a part of the contract of carriage. The same is true here. The Court of Appeals for the Second Circuit regarded *the position of the*

> *carrier's signature* in The Kungsholm as 'decisive against the carrier.' Baron v. Compagnie Generale Transatlantique, 2 Cir., 108 F.2d 21, 23. It is likewise decisive against this carrier on its motion for summary judgment." (Emphasis added)

A motion for summary judgment was denied for exactly the same reason in *Mayer* v. *Zim Israel Navigation Co.*, 177 F.Supp. 69 (S.D.N.Y. 1959), *aff'd on other grounds*, 289 F.2d 562 (2nd Cir. 1961), *cert. denied*, 368 U.S. 889 (Petition, pp. 10, 11).

C.

The Binding Effect Of The Conditions And Limitation Provisions In Petitioners' Cruise Passage Contract Is Established By The Decision Of The Second Circuit In The Baron Case.

Petitioners have avoided any reference to one of the cases discussed by the district court (R. 39, pp. 5, 6, 7), *Baron* v. *Compagnie Generale Transatlantique*, 108 F.2d 21 (2d Cir. 1939), although the steamship ticket involved in that case cannot be distinguished in any significant respect from petitioners' cruise passage contract. Affirming the district court's dismissal of a passengers' suit for failure to comply with a fifteen day written notice of claim provision in the ticket which had not been read by the passengers, the court of appeals said:

> ". . . The point principally contested is whether the provision regarding notice was part of the contract of transportation. The ticket was headed 'Passage Contract. Subject to the Terms Stated on This Page and Overpage.' Then came a blocked space across the page for the name of the steamer, ports, date of sailing, names of passengers, ocean fares. *Beneath the space* were the words *in prominent red type*, 'Passen-

gers should read the terms of the contract of carriage stated below and overpage, their particular attention being called to the limitations of liability therein contained.' This sentence was followed by the heading 'Terms of Contract—Read Before Accepting.' The carrier's agreement to carry the passenger in consideration of the fare was then set forth, followed immediately by provisions in numbered paragraphs. The numbered paragraphs began near the foot of the page and continued over on the back. The paragraph relative to notice of claims was paragraph 6. *At the end of the numbered paragraphs was the printed signature of the carrier.*

• • •

"The distinction laid down in The Majestic, 166 U.S. 375, 17 S.Ct. 597, 41 L.Ed. 1039, is between provisions in a steamship ticket which amount only to notices and provisions which are formally incorporated into the contract of passage. Provisions that are mere notices are not operative, unless actually brought to the passenger's attention. Baer v. North German Lloyd, 2 Cir., 69 F.2d 88; Maibrunn v. Hamburg American S.S. Co., 2 Cir., 77 F.2d 304; Bellochio v. Italia Flotte Riunite Cosulich Line, 2 Cir., 84 F.2d 975; The Kungsholm, 2 Cir., 86 F.2d 703. On the other hand, provisions that appear on the ticket as part of the contract of passage embodied in the ticket are binding regardless of whether they were read by the passenger, provided they are not unlawful in content. The Leviathan, 2 Cir., 72 F.2d 286; Murray v. Cunard S.S. Co., 235 N.Y. 162, 139 N.E. 226, 26 A.L.R. 1371. *In the present case the form of the ticket shows unmistakably that the numbered paragraphs under the heading 'Terms of Contract' were incorporated textually into the contract of passage. The* case is not to be distinguished from Murray v. Cunard S.S. Co., supra.

"Of the authorities relied on by the plaintiffs, The Kungsholm, supra, is closest to this case. *There the carrier's signature was not at the foot of the stipulations but was in the box on the face of the ticket. We regarded that fact as decisive against the carrier. In the present case the signature or authentication of the carrier appears at the foot of the 'Terms of Contract,' and at no other place. Everything printed on the ticket rebuts the contention that the contract of carriage was restricted to the blocked space for names, dates and fares.* We see no escape from the conclusion that the provision requiring written notice of claim was part of the contract of transportation and was therefore binding on the plaintiff." (Emphasis added)

Comparing petitioners' ticket point by point with the Barons' ticket, both (a) were headed "Passage Contract"; (b) had a "box"; (c) had a notice *below the box in red type* calling attention to the terms of the contract of carriage below and on the reverse side or overpage; (d) followed the notice with the heading "Terms of Contract" or "Contract of Carriage"; (e) followed the headings immediately with the provisions of the contract and continued them over on the back; and (f) placed the printed signature of the carrier *at the foot* of the "Terms of Contract" or "Contract of Carriage" and at no other place.

Steamship tickets vary in form, size and arrangement. Some have references to terms and conditions in the "box" [*Geller* v. *Holland-American Line*, 201 F. Supp. 508 (S.D. N.Y. 1961)], some commence in the box, are carried on the face of the ticket and back into the box [*Foster* v. *Cunard White Star, Ltd.*, 121 F.2d 12 (2d Cir. 1941)] and others merely run through the ticket [*Lipton* v. *National Hellenic American Lines*, 294 F.Supp. 308 (E.D.N.Y.

1968)]. In all cases upholding unread limitation provisions, however, it will be found that the references to terms and conditions or the terms and conditions themselves appear *above* the signature of the carrier as in *Baron* instead of *below* the signature as in *The Kungsholm*. And it will be found, as the district court held with respect to petitioners' ticket, that the courts felt that the steamship lines had done all they could reasonably have been expected to do to warn the passenger that the terms and conditions were important contractual limitations affecting the passenger's legal rights. Or, as stated in another way in *Lipton* v. *National Hellenic Lines, supra,* that the ticket did not fail "to come up to the standard of reasonable communicativeness that could be inferred from the forms of other carriers' tickets." 294 F.Supp. at 311.

Clearly the district court considered the entire body of maritime law on the question presented and was correct in holding that:

> "Although plaintiffs correctly evaluate the holdings of the earlier decisions, they do not properly apply the legal principles enunciated therein to the facts of this case." (R. 39, p. 7).

It is equally clear that the courts below followed the law as enunciated in the decisions of this Court and the Second Circuit and that no conflict whatsoever exists between those decisions and the decision in petitioners' case.

II.

PETITIONERS' REASON II FOR GRANTING THE WRIT HAS NO BASIS IN FACT AND MEETS NONE OF THE CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI SET FORTH IN SUPREME COURT RULE 19.

The record is bereft of any references to the size of respondent's organization or any facts to support the assertion that respondent occupied any bargaining position superior to that of petitioners. Any intimation that claim and suit time limitation provisions in steamship passage contracts are contrary to public policy is easily answered not only by reference to the numerous decisions heretofore discussed concerning the validity of such provisions but by the fact that the Congress of the United States has tacitly recognized the validity of such provisions. Irrespective of what periods may be prescribed by state statutes of limitation, the only regulation of claim and suit time limitations in steamship passage contracts executed in the United States is set forth in 46 U.S.C. § 183b(a), namely that:

> "(a) It shall be unlawful for the . . . owner of any seagoing vessel . . . to provide by . . . contract . . . a shorter period for giving notice of, or filing claims for loss of life or bodily injury, than six months, and for the institution of suits on such claims, than one year, such period to be computed from the day when the death or injury occurred."

By no stretch of the imagination can petitioners' unsupported assertions on pages 15 and 16 of the petition conform to the provisions of Rule 19 of this Court.

III.

PETITIONERS' REASON III FOR GRANTING THE WRIT MERELY SEEKS A REVIEW OF THE RULING OF THE COURTS BELOW THAT FOUR MONTHS WAS A REASONABLE TIME TO REQUIRE SUIT TO BE INSTITUTED ON PETITIONERS' BREACH OF CONTRACT CLAIM.

It is conceded that contractual limitation periods which are unreasonably short are against public policy and unenforceable. It is also conceded that in determining whether a particular contract limitation period is reasonable in length, the court should consider the special circumstances of each case. However, the cases cited on page 16 of the petition most assuredly do not hold that a four month suit time limitation is unreasonable. On the contrary, the majority support the reasonableness of a four month suit time provision.

Brown & Guenther v. *North Queensview Homes, Inc.*, 239 N.Y.S. 2nd 842 (N.Y. Sup. Ct. 1963), simply held that a provision in a non-maritime contract requiring that a demand for arbitration of a dispute be made with *fifteen days* was unreasonable.

In *The President Polk,* 43 F.2d 695 (2 Cir. 1930), a *thirty* day suit time limitation in a bill of lading was held to be unreasonable and ineffective to bar prosecution of a suit instituted in *less than four months.*

Kemelhor v. *Furness Withy & Co., Limited,* 248 N.Y.S. 659, held a *two months* suit time limitation for baggage damage in a passage contract to be unreasonable and not a bar to a suit instituted in *five months.*

However, in *Capehart* v. *Heady,* 23 Cal. 851 (Cal. App. 1962), it was held that the reasonableness of a time limita-

tion in a contract was a question of law for the court to decide and a limitation of *three months* was held to be reasonable.

This Court has declared that a bill of lading provision requiring suit to be brought within *ninety days* is not unreasonable. *Missouri, K. & T. Ry. Co.* v. *Harriman,* 227 U.S. 657, 673 (1913).

Even if authorities could have been cited in the petition to support the contention that the suit time limitation in petitioners' contract was unreasonable, it could not be contended that there was no contractual time limitation at all. The authorities cited in the petition and other authorities on the same point clearly establish that where a suit time limitation is found to be unreasonable under the circumstances of a given case, the court will merely expand the time so as not to bar a suit filed within a reasonable time. *W. R. Grace & Co.* v. *Panama R. R. Co.,* 12 F.2d 338 (2 Cir. 1926); *The Majestic,* 30 F.2d 822 (S.D.N.Y. 1928).

What the petitioners did immediately after leaving the Bergensfjord or in the months thereafter is of no moment. They had referred the matter to their attorneys and the latter had lodged a claim on their behalf with respondent within a week. All facts required to institute a suit were then at hand. (R. 15, Ex. G). Upon receipt of Mr. Odd's letter of March 11, 1969 (R. 15, Ex. R), petitioners' attorneys could have no doubts about respondent's settlement position and its intention to defend on its rights *under the passage contract.* If counsel for petitioners did not have their clients' copy of the passage contract, a telephone or mail request to respondent's Chicago office would have enabled them to obtain a duplicate.

The district court clearly did not err when it ruled, with respect to the contention that the four month limitation was unreasonable:

> "It is apparent that plaintiffs were on notice by mid-March of 1969 of the defendant's intention to stand on its rights under the passage contract. Within two months of their having left the Bergensfjord, plaintiffs had exhausted all possibilities for a negotiated settlement. Under such circumstances, a four months limitation period was not unreasonable. Plaintiffs had ample time to file their claim, attempt to negotiate a settlement, and after negotiations failed to file suit. Instead, they waited until March 6, 1970, almost one year later, before filing suit." (R. 39, pp. 15, 16)

CONCLUSION

Petitioners do not have any grounds for a review of this cause and their petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 72-223

In the Supreme Court of the United States

BERNIE and RUTH HAHN,

Petitioners,

vs.

NORWEGIAN AMERICA LINE,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INTRODUCTION

Respondent makes a suggestion with which petitioners wholeheartedly concur since it goes to the heart of this case: examine respondent's ticket. A copy of the ticket issued to petitioners is reproduced to actual size in Appendix C to the petition (App. 17-19).

The examination discloses a reference in small print on the front of the ticket to two pages containing 22 lengthy paragraphs of provisions, all in fine print. These 22 provisions contain several thousand words. Not one of the

provisions benefits the passenger. The total result is an onerous and unconscionable "contract."*

Not surprisingly, respondent finds itself able to invoke one of these provisions in an attempt to evade liability in this action, *i.e.*, a provision which purports to shorten the time to file suit from five years under the applicable Illinois statute to 120 days.

This case has ramifications far beyond its individual facts. The issue squarely before this Court, and not answered by respondent, is whether corporations may foist upon the unsuspecting public one-sided exculpatory provisions buried in lengthy form contracts. Millions of citizens unwittingly fall prey to similar provisions. This case presents a unique opportunity for this Court to speak out on this unconscionable practice because it falls within federal maritime jurisdiction. Grounds for granting the petition are unquestionably present.

I.

RESPONDENT'S BRIEF SHOWS THE IMPORTANCE OF RESOLVING THE CONFLICT BETWEEN THE DECISIONS OF THIS COURT AND THE SECOND CIRCUIT WITH THE DECISION BELOW.

(Reply to Part I.)

In *The Majestic*, 166 U.S. 375 (1897), this Court held that fine-print exculpatory provisions contained on the

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* Respondent states (p. 3) that the reverse side of the ticket sets forth the "respective rights and obligations" of the parties. A review of these finely printed provisions, however, will fail to disclose any "right" accorded the passenger. Rather, all 22 paragraphs serve only to shield respondent from almost every conceivable type of liability.

backside of a passenger's ticket were ineffective in limiting a steamship company's liability. The front of the ticket contained a notice referring to these provisions which was similar, if not superior, to the notice in respondent's form of ticket. 166 U.S. at 376-78. This Court stated that, under the well-established rule in England which is also the law in this country, for such exculpatory provisions to be effective the passenger must have *actual* knowledge of the provisions "unless [the provisions are] referred to in the *body* of the contract." (Emphasis added.) 166 U.S. at 382-84. In *The Majestic*, this Court expressly adopted a salutary policy condemning the use of fine-print clauses in steamship passenger tickets.

In subsequent decisions interpreting *The Majestic*, the Second Circuit has held that actual notice to the passenger is excused only if the provisions are incorporated into the "box" of the ticket which is considered to be the body of the contract. *The Kungsholm*, 86 F.2d 703, 704 (2d Cir. 1936); *Maibrunn* v. *Hamburg-American S.S. Co.*, 77 F.2d 304 (2d Cir. 1935); *Mayer* v. *Zim Israel Navigation Co.*, 177 F.Supp. 69 (S.D.N.Y. 1959), *aff'd*, 289 F.2d 562 (2d Cir. 1961), *cert. denied*, 368 U.S. 889 (1961). See also, *Toohill* v. *Cunard Steamship Co.*, 130 F.Supp. 128, 129 (D.Mass. 1955).

It is undisputed that petitioners did not have actual notice of the provision relied on by respondent and there was no reference to it in the box of the ticket. Therefore, the decision below irreconcilably conflicts with the decision in *The Majestic* and its Second Circuit progeny.

Respondent cites no decisions of this Court which in any way support the decision of the Seventh Circuit and does not contest the fact that the Seventh Circuit

applied a completely different test than that established by this Court. Furthermore, the lower court cases cited by respondent (Brief, pp. 11, 16-19) all applied the objective test of *The Majestic* rather than the novel subjective test adopted by the Seventh Circuit. These cases do not lend any support to the Seventh Circuit's decision on the facts since each involved a ticket containing a reference to the exculpatory provisions within the area containing the essential terms.

The cases cited by respondent emphasize that for the last seventy years the Second Circuit has consistently applied the objective standard established by this Court in *The Majestic,* as opposed to the subjective standard adopted by the Seventh Circuit. The unprecedented approach adopted by the Seventh Circuit should be rejected as is evident from the gross injustice worked by it in the case at bar.

This Court should put to rest whether *The Majestic* is still the law and should resolve the conflict between that decision and the Second Circuit decisions cited by petitioner with the decision below. Otherwise, companies governed by federal law will continue to use one-sided, fine print provisions to the detriment of unsuspecting consumers.

II.

RESPONDENT'S MISLEADING DISCUSSION EVADES PETITIONERS' SECOND REASON FOR GRANTING THE PETITION.

(Reply to Part II.)

Respondent is correct that there is no federal maritime limitations statute governing the instant action. However, it is well-established that state statutes of limitation govern

in the absence of federal statutes of limitation. *E.g., Daly* v. *Columbia Broadcasting System, Inc.*, 309 F.2d 83, 86 (1962) (Illinois statute governs in federal question case under Federal Communications Act).

The important point, not answered by respondent, is whether a corporation may avoid liability by relying on fine-print provisions in lengthy form contracts. The danger of permitting corporations to foist one-sided terms, such as the one relied upon by respondent, on consumers was recently recognized by the Indiana Supreme Court in *Weaver* v. *American Oil Co.*, 276 N.E.2d 144, 147-48 (Ind. 1972), which stated:

> "When a party can show that the contract, which is sought to be enforced, was in fact an unconscionable one, due to a prodigious amount of bargaining power on behalf of the stronger party, which is used to the stronger party's advantage and is unknown to the lesser party, causing a great hardship and risk on the lesser party, the contract provision, or the contract as a whole, if the provision is not separable, *should not be enforceable on the grounds that the provision is contrary to public policy.* The party seeking to enforce such a contract has the burden of showing that the provisions were explained to the other party and came to his knowledge and there was in fact a real and voluntary meeting of the minds and not merely an objective meeting." (Emphasis added.)

In this case, there can be no doubt that there was no negotiation over respondent's boilerplate clauses. Petitioners, as most consumers, had no opportunity to bargain with respect to predetermined, one-sided conditions. Petitioners were simply told that they were buying an expensive cruise ticket and that various accommodations would be provided aboard ship. They certainly were not told that by accepting the ticket they practically abrogated their

right to sue respondent for its fraudulent representations concerning the cruise.

The not uncommon lopsided bargaining situation by which petitioners were victimized should be rectified by this Court. In the absence of a true meeting of the minds, fine-print clauses buried in form contracts governed by federal law should be declared invalid and unenforceable.

III.

THIS COURT SHOULD CONSIDER WHETHER DUE PROCESS PERMITS UNKNOWING WAIVER OF A STATUTORY LIMITATIONS PERIOD.

(Reply to Part III.)

The Illinois legislature has declared that a party to a contract, such as that involved in the instant case, should have five years in which to commence suit. Ill. Rev. Stat., 1971, ch. 83, §16. The legislative policy of this limitations period, upon which petitioners justifiably relied, should not be nullified.

In *Turoff* v. *Eastern Airlines*, 129 F.Supp. 319, 321 (N.D. Ill. 1955), the court held that a provision contained in an airline passenger's ticket shortening the statutory limitations period was unenforceable because the carrier had not demonstrated that the passenger actually knew of and accepted the provision. The Court recognized that this result was dictated by the policy of *The Majestic*:

> "The rule has been succinctly stated, however, that the terms of such a contract must be '*distinctly declared and deliberately accepted.*' [Citing *The Majestic*] . . . It must also be observed that Eastern has not alleged that the present plaintiff had knowledge of the limitation provision . . . and, nevertheless, knowingly accepted them as part of the contract of carriage." (Emphasis added.)

No such "knowing acceptance" exists in the case at bar regarding the four month limitations provision on the back of petitioners' ticket. Petitioners never read their ticket, nor were they ever advised by respondent of the existence of this provision. Petitioners justifiably acted under the assumption that their right to bring suit was protected by the Illinois statute which provides a 5 year limitations period. Under these circumstances, enforcement of the four month limitations provision amounts to a practical abrogation of the right to bring suit.

CONCLUSION

This Court should grant this petition to resolve the important issues raised by the decision below.

Respectfully submitted,

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